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JOHN T. FEY, Clerk

In the

United States Court of Appeals

For the Seventh Circuit

No. 12046

CITY MESSENGER OF HOLLYWOOD, INC., A California corporation, doing business under the tradename of CITY MESSENGER AIR EXPRESS,

Plaintiff-Appellant,

vs.

CITY BONDED MESSENGER SERVICE, INC., by change of name from CITY BONDED MESSENGER AND TRUCKING SERVICE, INC., an Illinois corporation, CITY BONDED TRUCKING COMPANY, INC., an Illinois corporation, THE ILLINOIS BELL TELEPHONE COMPANY, an Illinois corporation, and the REUBEN H. DONNELLEY CORPORATION, an Illinois corporation,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

Honorable
John P. Barnes,
Judge Presiding.

Appellant's Appendix

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CITY MESSENGER OF HOLLYWOOD, INC., A California corporation, doing business under the tradename of CITY MESSENGER AIR EXPRESS,

Plaintiff-Appellant,

vs.

CITY BONDED MESSENGER SERVICE, INC., by change of name from CITY BONDED MESSENGER AND TRUCKING SERVICE, INC., an Illinois corporation, CITY BONDED TRUCKING COMPANY, INC., an Illinois corporation, THE ILLINOIS BELL TELEPHONE COMPANY, an Illinois corporation, and the REUBEN H. DONNELLEY CORPORATION, an Illinois corporation,

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Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

Honorable John P. Barnes, Judge Presiding.

Appellant's Appendix

1

IN THE UNITED STATES DISTRICT COURT

(Civil Action—No. 55 C 575)

PREFIX TO RECORD IN ACCORDANCE WITH RULE 12(c) OF THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

On April 19, 1955, the plaintiff filed a Complaint in the above entitled cause. The plaintiff was City Messenger of Hollywood, Inc., a California corporation, doing business under the trade name of City Messenger Air Express, and the defendants were City Bonded Messenger & Trucking Service, Inc., an Illinois corporation, Irving Mansfield, Nadine Mansfield, Illinois Bell Telephone Company, an Illinois corporation, and The Reuben H. Donnelley Corporation, an Illinois corporation. City Bonded Messenger and Trucking Service, Inc., an Illinois corporation,

2 changed its name, during the pendency of the above entitled action, to City Bonded Messenger Service, Inc., and City Bonded Trucking Company, Inc., an Illinois corporation, was added as a defendant herein during the trial of the cause. On April 27, 1955, the Illinois Bell Telephone Company, an Illinois corporation, filed an Answer, Counterclaim and Cross-Claim. On April 27, 1955, the Reuben H. Donnelley Corporation, an Illinois corporation, filed an Answer, Counterclaim and Cross-Claim. On June 28, 1955, the City Bonded Messenger and Trucking Service, Inc., Irving Mansfield and Nadine Mansfield filed an Answer and Counterclaim, to-wit: Count I of the Counterclaim was by the City Bonded Messenger and Trucking Service, Inc. and Count II of the Counterclaim was by City Bonded Messenger and Trucking Service, Inc., Irving Mansfield and Nadine Mansfield. On August 12, 1955, by

leave of court on motion, City Bonded Messenger and Trucking Service, Inc., filed Count III to the Counterclaim. On September 1, 1955, the plaintiff filed a motion to strike Count II of the Counterclaim, and filed an Answer to Counts I and III of the Counterclaim. On September 14, 1955, the motion to strike Count II of the Counterclaim was withdrawn and leave was given to defendants to file an Amended Count II of the Counterclaim. On September 27, 1955, an Amended Count II of the Counterclaim

3 was filed. On October 11, 1955, the plaintiff filed an Answer to Amended Count II of the Counterclaim. The trial was had before the Honorable John P. Barnes on February 15, 18, 19, 20, 21, 25, 26 and 27, and March 1, 1957. On February 21, 1957, when the plaintiff rested his case, Nadine Mansfield and Irving Mansfield were dismissed as defendants. On February 28, 1957, City Bonded Messenger Service, Inc. and City Bonded Trucking Company, Inc., filed Count IV of the Counterclaim. On March 14, 1957, the court entered findings of fact, conclusions of law and judgment order. The judgment order contained an injunction against the plaintiff and referred the cause to a Master in Chancery for an accounting, assessment of costs, treble damages and attorneys fees against the plaintiff. On March 14, 1957, the court also entered an injunction order against the defendants Illinois Bell Telephone Company and The Reuben H. Donnelley Corporation. On April 8, 1957, an order was entered commanding the plaintiff to file $7,500.00 security for costs in addition to the security bond for $250.00, previously filed by plaintiff. On April 11, 1957, the plaintiff filed a Notice of Appeal from the judgment order of March 14, 1957, and a bond on appeal in the sum of $250.00. On April 19, 1957, a motion was filed for a rule to show cause why the plaintiff should not be held in contempt for violating the injunction of March 14, 1957, to which motion the plaintiff

filed an Answer on April 24, 1957, and the Counter-
4 claimants filed a Reply to said Answer on April 26, 1957. On April 19, 1957, a motion was filed for rule to show cause why the plaintiff should not be held in contempt of court for failure to comply with the order of April 8, 1957, for the filing of $7,500.00 additional security. On April 29, 1957, both motions of April 19, 1957, were continued generally.

6

IN THE UNITED STATES DISTRICT COURT

(Civil Action—No. 55 C 575)

COMPLAINT

[Filed April 19, 1955]

Plaintiff, City Messenger of Hollywood, Inc., a California corporation doing business under the trade name of City Messenger Air Express, complaining of the defendants, City Bonded Messenger & Trucking Service, Inc., an Illinois corporation, Irving Mansfield, Nadine Mansfield, Illinois Bell Telephone Company, an Illinois corporation, and The Reuben H. Donnelley Corporation, an Illinois corporation, states as follows:

1. Plaintiff, City Messenger of Hollywood, Inc., is a corporation duly incorporated and existing under the laws of the State of California and is engaged, pursuant to authority granted by the Civil Aeronautics Board, in the business of an Air Freight Forwarder in interstate commerce under the trade name of City Messenger Air Express.

2. The defendant, City Bonded Messenger & Trucking Service, Inc., is a corporation incorporated and existing under the laws of the State of Illinois. The defendants, Irving Mansfield and Nadine Mansfield, are both citizens of

the State of Illinois, and are the President and Secretary respectively of said defendant corporation.

3. The defendant, Illinois Bell Telephone Com-
7 pany, is a corporation incorporated and existing under the laws of the State of Illinois, and is engaged in the business of providing telephone service and facilities to its subscribers. In connection with its business said defendant periodically publishes an alphabetical telephone directory for the Chicago area. The defendant, The Reuben H. Donnelley Corporation, is a corporation incorporated and existing under the laws of the State of Illinois, and in connection with its busine as a publisher periodically publishes the Chicago Classified Telephone Directory.

4. The matter in controversy herein exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars ($3,000.00).

5. Said plaintiff is qualified, and duly registered with the Civil Aeronautics Board to engage in business as an Air Freight Forwarder in interstate commerce under the trade name of City Messenger Air Express, pursuant to a certain Letter of Registration No. 163 issued to the Plaintiff on May 21, 1954 by the Civil Aeronautics Board under the provisions of Part (Section) 296 of the Economic Regulations of the Civil Aeronautics Board (Title 14, Code of Federal Regulations, Subchapter B—Economic Regulations, Part 296) relating to indirect air transportation of property between places in the continental United States. A photostatic copy of said Letter of Registration is attached hereto and made a part hereof as Plaintiff's Exhibit "A".

6. Part 296.1 of the said Economic Regulations of the Civil Aeronautics Board (Title 14, Code of Federal Regulations, *supra*) defines an "Air Freight Forwarder" as follows:

> "An air freight forwarder shall be defined to mean any person which engages indirectly in air transporta-

tion of property only, and which, in the ordinary and usual course of his undertaking, (a) assembles and consolidates or provides for assembling and consolidating such property and performs or provides for the performance of breakbulk and distributing operations with respect to such consolidated shipments, (b) assumes responsibility for the transportation of such property from the point of receipt to the point of destination, and (c) utilizes for the whole or any part of the transporation of such shipments, the services of a direct air carrier subject to the act."

8 7. Part 296.6 of the said Economic Regulations of the Civil Aeronautics Board (Title 14, Code of Federal Regulations, supra), which provides that no person may engage in the business of an Air Freight Forwarder without first obtaining a Letter of Registration issued by the Civil Aeronautics Board, reads as follows:

"No person shall engage in air transportation pursuant to the exemption granted by this part unless there is in force with respect to such person a letter of registration issued by the Board."

8. The defendant, City Bonded Messenger & Trucking Service, Inc., is not and has never been licensed by or registered with the Civil Aeronautics Board to engage in business as an Air Freight Forwarder in interstate commerce, either under its own name or in the name of City Messenger Air Express.

9. Part 296.16 of the Economic Regulations of the Civil Aeronautics Board (Title 14, Code of Federal Regulations, supra), dealing with the business name or names under which an Air Freight Forwarder may do business, provides in part as follows:

"On and after Nov. 15, 1952, it shall be an express condition upon exercise of the privileges granted by this part and the letters of registration issued hereunder, that the air freight forwarder concerned, in holding out to the public and in performing air trans-

portation services shall do so only in a name the use of which is authorized under the provisions of this section.

"(a) Except as otherwise provided under par. (b) of this section, an air freight forwarder may do business in the name in which its letter of registration is then issued and outstanding, including abbreviations, contractions, initial letters, or other minor variations of such name which are readily identifiable therewith.

"(b) An air freight forwarder may do business in such other and different name or names as the Board may by order permit, upon a finding that the use of such other name or names is not contrary to the public interest."

10. In connection with plaintiff's operations as an authorized Air Freight Forwarder, said plaintiff is licensed to do business as a foreign corporation in New York and Illinois, and maintains offices and telephone listings under the name of City Messenger Air Express and City Messenger Service in various cities throughout the United States, including the following:

	City	*Address*	*Telephone*
(a)	New York, New York	203 E. 36th Street New York 16, N. Y.	Murray Hill 5-1166
(b)	Chicago, Illinois	845 S. Wabash Ave. Chicago 5, Illinois	Wabash 2-1850
(c)	Hollywood, California	1414 Cole Place Los Angeles 28, Cal.	Hollywood 4-1188
(d)	Los Angeles, California	727 W. 7th Los Angeles, Cal.	Mutual 8191
(e)	Bevery Hills, California	300 S. Beverly Drive Beverly Hills, Cal.	Crestwood 5-0183

In addition, plaintiff employs in connection with its nationwide operations exclusive agents in numerous other cities and communities in the United States, including San Francisco, Cleveland, Dayton and Philadelphia, to process, on behalf of City Messenger Air Express at agreed upon compensatory rates, plaintiff's inbound and outbound air shipments, and to promote and sell City Messenger Air Express service to local shippers. Such exclusive agents are required to render periodic reports and accountings to City Messenger Air Express, 1414 Cole Place, Hollywood, California, of all prepaid and collect shipments handled in their particular city, and are required and directed to consign all shipments to City Messenger Air Express, c/o the agent's concern.

11. That on or about the month of June, 1954, the plaintiff employed the defendant, City Bonded Messenger and Trucking Service, Inc., as its exclusive agent in the City of Chicago, Illinois, to process plaintiff's City Messenger Air Express inbound and outbound air shipments, and to promote and sell City Messenger Air Express service to shippers in the Chicago area. Said defendant was at that time advised by the plaintiff of the applicable tariff rates covering such air shipments, was advised and instructed that all shipments were to be consigned to City Messenger Air Express, c/o the said defendant, was advised and instructed to render periodic reports and accountings to the plaintiff on all prepaid and collect shipments, and was otherwise advised and instructed by the plaintiff as to the procedures for processing said air shipments.

12. The said defendant, City Bonded Messenger & Trucking Service, Inc., acted as the exclusive Chicago agent for the plaintiff, for purposes of processing plaintiff's City Messenger Air Express inbound and outbound air shipments, until on or about December 29, 1954, at which time

the said defendant, through Irving Mansfield, its President and co-defendant herein, suddenly notified the plaintiff that the said defendant firm no longer had the time to devote to City Messenger Air Express service.

13. The plaintiff has now discovered, and alleges the facts to be that the said defendant firm, in conjunction with its principal officers, Irving Mansfield and Nadine Mansfield, co-defendants herein, did, during the period from the month of June, 1954, to on or about December 29, 1954, while acting and purporting to act as exclusive Chicago agent for the plaintiff for purposes of processing plaintiff's City Messenger Air Express inbound and outbound air shipments, with intent to defraud the plaintiff and in breach of its fiduciary duties as agent for the plaintiff, secretly and fraudulently divert City Messenger Air Express shipments to their own use, and did fraudulently appropriate the proceeds of such shipments to their own use, without accounting to the plaintiff for the same. That the amount of such proceeds so wrongfully and unlawfully diverted and appropriated by the said defendants will be more fully ascertained upon an accounting had of said defendants, but is alleged by the plaintiff, on information and belief, to be in excess of the sum of Ten Thousand Dollars ($10,000.00).

14. In addition to the aforesaid wrongful acts, the said defendants, City Bonded Messenger & Trucking Service, Inc., Irving Mansfield and Nadine Mansfield, have since on or about the month of October, 1954, to this date present, engaged and now continue to engage in various unlawful, unfair and deceptive methods of competition to the injury and damage of plaintiff's property rights as are more fully hereinafter set forth:

(a) That said defendants on or about the month of October, 1954, in pursuance of their wrongful scheme to divert and appropriate to their own use the good-

will and business associated with plaintiff's trade name of City Messenger Air Express, did, without the knowledge and consent of the plaintiff, apply for and obtain a telephone listing from the Illinois Bell Telephone Company to-wit as follows:

"City Messenger Air Express RAndolph 6-2391"
193 N. La Salle Street, Chicago, Ill.

That the said defendants are presently maintaining said telephone listing under the name of City Messenger Air Express and receiving telephone calls intended for the plaintiff at the office of the defendant, City Bonded Messenger & Trucking Service, Inc., 193 N. La Salle Street, Chicago, Illinois, have refused to give up the aforesaid telephone listing under the name of City Messenger Air Express, and are fraudulently holding themselves out to air shippers and to the public generally as being City Messenger Air Express, though in fact said defendants are not authorized or registered to do business as an Air Freight Forwarder, and are in violation of the Economic Regulations of the Civic Aeronautic Board. That as a result of said telephone listing aforesaid, the Illinois Bell Telephone Company, on or about the month of January, 1955, after the defendant, City Bonded Messenger & Trucking Service, Inc., had terminated its agency, refused to grant the plaintiff a telephone listing under its authorized and legitimate trade name of City Messenger Air Express, and finally only did so upon the plaintiff exhibiting to said Telephone Company a copy of plaintiff's Letter of Registration N. 163 issued to the plaintiff by the Civil Aeronautics Board. That plaintiff now has a telephone listing for its newly established Chicago office as follows:

"City Messenger Air Express WAbash 2-1850"
845 S. Wabash Avenue, Chicago, Ill.

That as a consequence of the two telephone listings aforesaid under the name of City Messenger Air Express, shippers and callers making telephone calls intended for the plaintiff's Chicago office are being diverted to the office of the defendant, City Bonded Messenger & Trucking Service, Inc., which through

its officers, Irving Mansfield and Nadine Mansfield, is holding itself out as being City Messenger Air Express.

(b) By way of illustrating the operation of such false, deceptive and unfair trade practices upon the part of the defendants, the plaintiff further states the facts to be that on or about the early part of January, 1955, the said defendants picked up in the name of City Messenger Air Express an air express shipment from Modern Talking Pictures, 420 N. Michigan Avenue, Chicago, Illinois, for shipment to the Los Angeles office of said Modern Talking Pictures firm; that said defendants then shipped said shipment via the Air Express division of Railway Express Agency, with Nadine Mansfield, defendant herein, as the named consignor of said shipment, and the Los Angeles office of Modern Talking Pictures, as the named consignee. Thereafter when said shipment failed to arrive at its destination, the said shipper, Modern Talking Pictures, made inquiry of and looked to the plaintiff, City Messenger Air Express, to whom it was under the impression and belief that it had made delivery of the shipment.

(c) The defendant, City Bonded Messenger & Trucking Service, Inc., through its officers and agents, Irving Mansfield and Nadine Mansfield, is and has been, without the consent or approval of the plaintiff, falsely, fraudulently and deceptively advertising and holding itself out as (1) "City Messenger Air Express", (2) as being "the only national messenger service in the U. S. A.", (3) as providing "City Messenger national credit . . . for charging messenger service at a City Messenger office whether in New York, Chicago, Hollywood, Beverly Hills or Los Angeles", (4) to handle "Air Freight", and (5) as having certain listed offices in New York, Hollywood, Los Angeles, and Beverly Hills. Attached hereto and made a part of this Complaint is a photostatic copy of a certain circular, identified as plaintiff's Exhibit "B", being distributed and published by the said defendants, without the consent or approval of the plaintiff, evidencing said unfair, fraudulent and deceptive advertising

and business practices. Plaintiff further states the facts to be that the telephone number listings shown on said circular for New York, Hollywood, Los Angeles and Beverly Hills, deceptively and fraudulently duplicate and simulate exactly the telephone listings maintained by plaintiff's offices in those cities as set forth in Paragraph 10 hereinabove, though in fact said de-
13 fendants do not have or maintain any such offices or telephone listing in said cities.

(d) That in pursuance of their wrongful scheme to discredit the plaintiff and to divert and appropriate to their own use the goodwill and business associated with plaintiff's trade name of City Messenger Air Express, the said defendant, City Bonded Messenger & Trucking Service, Inc., Irving Mansfield and Nadine Mansfield have been and are falsely telling and representing to shippers and various airlines, including in particular the United Air Lines and Eastern Air Lines offices in Chicago, Illinois, that the plaintiff is a poor credit risk, that the plaintiff is out of business, and that the plaintiff has no service in or out of Chicago.

(e) That the plaintiff is duly licensed as a foreign corporation to do business in the State of Illinois, and has filed with the Clerk of the County Court of Cook County, Illinois, an Assumed Name Certificate to the effect that it "is conducting and transacting a business of expediting, forwarding and consolidating air express and general freight at 845 South Wabash Avenue, Chicago, in said County and State under the name of City Messenger Air Express." That said defendant, City Bonded Messenger & Trucking Service, Inc., acting through its officers and agents, Irving Mansfield and Nadine Mansfield, in pursuance of their wrongful scheme to appropriate to their own use the plaintiff's trade name of City Messenger Air Express, and to divert and appropriate to their own use the goodwill and business associated with said trade name, did on January 19, 1955, wrongfully file an Assumed Name Certificate with the Clerk of the County Court of Cook County under the same name of City Messenger Air Express.

15. The plaintiff has acquired substantial and exclusive property rights in the use of the trade name City Messenger Air Exxpress and to its abbreviated form "CMAX", (a) by virtue of the fact that the exclusive use of said trade name by the plaintiff in connection with its operations as an Air Freight Forwarder is and has been expressly authorized and sanctioned by the Civil Aeronautics Board pursuant to the Letter of Registration No. 163 heretofore issued by said Board to the plaintiff in the name of the plaintiff doing business as City Messenger Air Express, plaintiff's Exhibit "A" supra, and the provisions of
14 the Economic Regulations of the Civil Aeronautics Board heretofore cited; (b) by virtue of the fact that said trade name, City Messenger Air Express, is and has been distinctively and uniquely associated with plaintiff's business as an Air Freight Forwarder, even before the said defendants began to wrongfully simulate the use of said trade name, and (c) by virtue of the goodwill attached to the use of said trade name inasmuch as said trade name has become recognized and associated with by shippers and the general public using air freight services, and by the various commercial airlines, as identifying the business and the business locations of the said plaintiff.

16. That the use by the defendant, City Bonded Messenger & Trucking Service, Inc., through its officers and agents Irving Mansfield and Nadine Mansfield, of plaintiff's trade name of City Messenger Air Express, under the facts and circumstances alleged aforesaid, constitutes a wrongful appropriation and an unwarranted and unlawful use by the said defendants, constitutes an unfair and deceptive method of competitive practice, is in direct violation of the regulations of the Civil Aeronautics Board under the Civil Aeronautic Act which, to protect the public interest, regulates the operation of Air Freight Forwarders, and which provides that the name used by an Air Freight Forwarder should not be contrary to the public interest

and should not constitute an unfair or deceptive practice or method of competition in air transportation.

17. That by reason of the wrongful acts of the said defendants, as alleged aforesaid, to discredit and defame the credit and reputation of the plaintiff, and to divert and appropriate to their own use the goodwill and business associated with plaintiff's trade name of City Messenger Air Express, the said plaintiff has suffered and continues to suffer substantial and irreparable injury and damage to plaintiff's business. That unless the said defendants, and each of them, City Bonded Messenger & Trucking Service, Inc., Irving Mansfield and Nadine Mansfield, and their agents, servants, attorneys and employees are immediately and forthwith restrained and enjoined, by a Writ of Injunction granted by this Court, from using, simulating or in any way copying plaintiff's trade name of City Messenger Air Express, and from holding themselves out as being City Messenger Air Express, and from engaging in the various unlawful, unfair and deceptive methods of competition and practices alleged aforesaid, the said plaintiff will suffer irreparable injury and damage to its property rights. That under the aforesaid circumstances the said plaintiff has no adequate remedy at law, and is entitled to equitable relief.

Wherefore, plaintiff asks judgment as follows:

(a) That an accounting be had and taken of the proceeds received by the defendants, and each of them, City Bonded Messenger & Trucking Service, Inc., Irving Mansfield and Nadine Mansfield, in connection with said defendants handling and processing inbound and outbound air shipments received or picked up or solicited by the defendants in the name of City Messenger Air Express, including the proceeds of shipments wrongfully diverted by the said defendants, and that said defendants, and each of them, be decreed to pay to the plaintiff such sum of moneys as may be found to be equitably due said plaintiff.

(b) That said defendants, and each of them, City Bonded Messenger & Trucking Service, Inc., Irving Mansfield, and Nadine Mansfield, be decreed to pay to the plaintiff such money damages as the plaintiff may be entitled to by virtue of the wrongful acts of said defendants in discrediting and defaming the credit and reputation of the plaintiff, and in diverting and appropriating to their own use the goodwill and business associated with plaintiff's trade name of City Messenger Air Express.

(c) That a Temporary Writ of Injunction be forthwith granted by this Court in favor of said plaintiff herein, restraining and enjoining the said defendants, and each of them, City Bonded Messenger & Trucking Service, Inc., Irving Mansfield and Nadine Mansfield, their agents, servants, attorneys and employees, from using, simulating or in any way copying plaintiff's trade name of City Messenger Air Express, including the abbreviation thereof of CMAX, and in holding themselves out as City Messenger Air Express. That upon hearng of this cause, said Writ of Injunction be made permanent.

(d) That a Temporary Writ of Injunction be also forthwith granted by this Court in favor of said plaintiff herein restraining and enjoining the Illinois Bell Telephone Company and The Reuben H. Donnelley Corporation, co-defendants herein, from carrying, holding out to the public or publishing any telephone listing under the name of City Messenger Air Express, other than as such listing may be authorized by the plaintiff, and directing said Illinois Bell Telephone Company and The Reuben H. Donnelley Corporation to discontinue and delete the following present telephone listing under the name of City Messenger Air Express, to-wit as follows:

"City Messenger Air Express RAndolph 6-2391"
193 N. LaSalle Street, Chicago, Ill.

That upon hearing of this cause, said Writ of Injunction be made permanent.

(c) That the plaintiff have such other and further relief as is appropriate in the premises and which this Court may deem meet.

City Messenger of Hollywood, Inc., a California corporation, doing business under the trade name of City Messenger Air Express.
By: Sidney Fullman /s/
Its Duly
Authorized Agent

17 State of California,
County of Los Angeles—ss.

Sidney Fullman, being first duly sworn on his oath, deposes and says that he is the Vice President and duly authorized agent of City Messenger of Hollywood, Inc., a California corporation, doing business under the trade name of City Messenger Air Express, plaintiff herein; that he has read the foregoing Complaint by him subscribed, and has knowledge of the facts stated therein, and that the facts stated therein are true in substance and in fact, except as to those matters which are therein stated to be on information and belief, and that as to such matters he believes them to be true. Said affiant further states that unless the Temporary Writ of Injunction prayed for in said Complaint is forthwith granted by this Court that said plaintiff will suffer irreparable injury.

/s/ Sidney Fullman

Subscribed and sworn to
before me this 14th day
of April, 1955, A. D.

/s/ Margaret V. Brain
Notary Public in and for
said County.

18. PLAINTIFF'S EXHIBIT "A"

Civil Aeronautics Board

Washington 25

Letter of Registration No. 163

Air Freight Forwarder

City Messenger of Hollywood, Inc.
d/b/a City Messenger Air Express
1414 Cole Place
Los Angeles 28, California

is hereby acknowledged to have duly registered with the Civil Aeronautics Board as an Air Freight Forwarder under the provisions of Part 296 of the Economic Regulations, relating to indirect air transportation of property only between places in the continental United States.

This Letter of Registration is not transferable and may be suspended, revoked or terminated in accordance with pertinent provisions of Part 296 of the Economic Regulations.

This is not a certificate of public convenience and necessity and is merely evidence of registration.

Issued: May 21, 1954

Effective: May 22, 1954

(S E A L)

M. C. Mulligan
M. C. Mulligan
Secretary

34

IN THE UNITED STATES DISTRICT COURT

(Civil Action—No. 55 C 575)

ANSWER

[Filed June 28, 1955]

Now come the Defendants, City Bonded Messenger & Trucking Service, Inc., Irving Mansfield and Nadine Mansfield, and in answer to Plaintiff's Complaint, admit, deny and allege as follows:

1. In answer to Paragraph 1, Defendants allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations thereof and, therefore, deny the same and leave Plaintiff to strict proof thereof except that they admit Plaintiff is a California corporation.

2. Defendants admit the allegations of Paragraphs 2 and 3.

35 3. In answer to Paragraph 4, Defendants deny the allegations thereof.

4. In answer to Paragraph 5, Defendants allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations thereof and, therefore, deny the same and leave Plaintiff to strict proof thereof, except that Defendants specifically deny that Plaintiff is qualified or has any right to engage in business as an Air Freight Forwarder in Interstate commerce and/or in the State of Illinois under the trade name of City Messenger Air Express.

5. In answer to Paragraphs 6 and 7, Defendants admit that the stated Parts of the Economic Regulations of the Civil Aeronautics Board read as alleged, but themselves allege that said Parts of said Economic Regulations of the Civil Aeronautics Board are not in any way involved in the subject controversy.

6. Defendants admit the allegations of Paragraph 8.

7. Defendants admit that Part 296.16 of the Economic Regulations of the Civil Aeronautics Board provides in part as alleged, but themselves allege that the said Part has no application to the herein controversy.

8. In answer to Paragraph 10, Defendants allege that they are without knowledge or information sufficient
36 to form a belief as to the truth of the allegations thereof and, therefore, deny the same and leave Plaintiff to strict proof thereof.

9. In answer to Paragraph 11, Defendants deny each and every allegation thereof and specifically deny that they were employed by the Plaintiff as its exclusive agent in the City of Chicago, Illinois, but *themselves aver that they were induced by said Plaintiff to enter into an agreement to purchase a one-half (½) interest in their alleged Air Freight Forwarding business.*

10. In answer to Paragraph 12, the Defendants deny each and every allegation thereof, but admit that on December 29, 1954, the said Irving Mansfield notified the Plaintiff that in view of the refusal of said Plaintiff to reduce to formal written terms the aforementioned contract and the termination of the aforementioned contract by the Plaintiff, the said Defendant, City Bonded Messenger & Trucking Service, Inc., no longer would permit Plaintiff to use its facilities, equipment, offices and services.

11. In answer to Paragraph 13, Defendants deny each and every allegation thereof and specifically deny that the said Defendant firm, alone or in conjunction with its principal officers, Irving Mansfield and Nadine Mansfield, did at any time while acting in any capacity whatsoever, divert City Messenger Air Express shipments to their
37 own use or to any other use, said Defendants further deny that they appropriated any proceeds of any shipments whatsoever to their own use.

12. In answer to Paragraph 14, said Defendants deny each and every allegation thereof and specifically deny that they have at any time engaged in any unlawful, unfair or deceptive methods of competition:

(a) Said Defendants deny that they did, without the knowledge and consent of the Plaintiff, apply for and obtain a telephone listing from the Illinois Bell Telephone Company to-wit as follows:

"City Messenger Air Express RAndolph 6-2391"
193 N. LaSalle Street, Chicago, Ill.

but on the contrary aver that said listing was obtained at the insistence of Plaintiff's Officers, Elliot Fullman and Sidney Fullman. That at the time alleged, said Plaintiff was using the facilities of Defendant, City Bonded Messenger & Trucking Service, Inc., including its offices, desks, telephones, services and the like, deny receiving telephone calls intended for the Plaintiff at the office of the Defendant, City Bonded Messenger & Trucking Service, Inc., 193 North La Salle Street, Chicago, Illinois, deny that any telephone calls from shippers and callers to the defendant, City Bonded Messenger & Trucking Service, Inc., are intended for Plaintiff's Chicago office or are being diverted to the office of the Defendant, City Bonded Messenger & Trucking Service, Inc., and further deny that Defendant, City Bonded Messenger & Trucking Service, Inc., through its Officers, Irving Mansfield and Nadine Mansfield, or through any other employees, officers or agents, is holding itself out as being the Plaintiff.

38 (b) Said Defendants deny each and every allegation of Part (b) of Paragraph 14 and specifically deny that they at any time picked up in the name of City Messenger Air Express, an air express shipment from Modern Talking Pictures, 420 North Michigan Avenue, Chicago, Illinois, for shipment to the Los Angeles office of said Modern Talking Pictures firm; said Defendants further deny that they shipped said shipment via the Air Express division of Railway Express Agency, or that the said Nadine Mansfield was named as consignor of the alleged shipment or of any other

shipment for Modern Talking Pictures; except that said Defendants aver that the said Modern Talking Pictures was a customer of theirs utilizing their surface messenger service for delivery of shipments to and from the airport in Chicago long prior to the date that Plaintiff first engaged in the Air Freight Forwarding business in Chicago, Illinois, and/or in Interstate commerce anywhere in the United States.

(c) Said Defendants deny each and every allegation of Part (c) of Paragraph 14 except they admit that Plaintiff's Exhibit "B" is a photostatic copy of a certain circular which was printed and distributed at the specific request of the Plaintiff, that substantially all of the copy contained in said circular was furnished by the Plaintiff and approved by the Plaintiff including the telephone number listings shown in the circular.

(d) Said Defendants deny each and every allegation of Part (d) of Paragraph 14 and specifically deny that they at any time attempted to discredit the Plaintiff or to divert and appropriate to their own use any goodwill or business which the Plaintiff may have had, or told or represented to shippers of various airlines, including in particular the United Air Lines and Eastern Air Lines offices in Chicago, Illinois, that the Plaintiff was a poor credit risk, that the Plaintiff was out of business, or that the Plaintiff had no service in or
39 out of Chicago. On the contrary said Defendants aver that at least in one instance when the United Air Lines threatened to discontinue affording credit to the Plaintiff, Defendants induced United Air Lines to continue affording credit to Plaintiff by agreeing to guarantee in the name of City Bonded Messenger & Trucking Service, Inc., the Credit of Plaintiff.

(e) In answer to Part (e) of Paragraph 14, said Defendants allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations that Plaintiff is duly licensed as a foreign corporation to do business in the State of Illinois, or has filed with the Clerk of the County

Court of Cook County, Illinois, an Assumed Name Certificate, except that said Defendants aver that paragraph 220 of Chapter 38, Revised Statutes of Illinois, directly prohibits a corporation from transacting any business under any other or different name than that conferred upon it by its Articles of Incorporation; Defendants deny that Defendant, City Bonded Messenger & Trucking Service, Inc., acting through its officers and agents, Irving Mansfield and Nadine Mansfield, did in pursuance of any wrongful scheme to divert and appropriate to their own use any goodwill or business that Plaintiff may have had, wrongfully file an Assumed Name Certificate with the Clerk of the County Court of Cook County.

13. In answer to Paragraph 15, the said Defendants deny each and every allegation thereof and specifically deny that the Plaintiff has acquired any property rights whatsoever in the use of the trade name, City Messenger Air Express, by virtue of any fact whatsoever; Defendants further deny that the Civil Aeronautics Board or any other agency has the right to authorize or sanction the use of the trade name, trade style and/or service mark of City Messenger Air Express to the Plaintiff in derogation of the long-established prior right of Defendant, City Bonded Messenger & Trucking Service, Inc., or any trade name, trade style or service mark dominated by the word "City" for use in connection with Messenger, Special Delivery, Drayage, General Trucking, Hauling or Moving services including specifically Air Freight Forwarding; said Defendants further deny that the Regulations of the Civil Aeronautics Board, cited by Plaintiff in its Complaint, expressly authorizes or sanctions the use of the trade name, City Messenger Air Express, by the Plaintiff for such use as amounts to an unfair or deceptive practice or an unfair method of competition; said Defendants further allege that Economic Regulations Amendment No.

1 to Part 296 of the Civil Aeronautics Board reads in part as follows:

> "The Board possesses the power, pursuant to Section 411 of the Civil Aeronautics Act to require a carrier, after notice and hearing, to cease and desist from the use of a given name in cases where it finds that such use by the carrier concerned amounts to an unfair or deceptive practice or an unfair method of competion."

14. In answer to Paragraph 16, said Defendants deny each and every allegation thereof and aver that Defendant, City Bonded Messenger & Trucking Service, Inc., having adopted and used said name continuously, openly and notoriously since a date long prior to the date that Plaintiff first began to use the name, City Messenger Service of Hollywood, Inc., and/or City Messenger Air Express, has the sole and exclusive right to said trade name and service mark and, therefore, deny that the use of any name dominated by the word "City" by Defendants constitutes a wrongful appropriation or an unwarranted or unlawful use by Defendants, or constitutes an unfair or deceptive method of competitive practice, except that said Defendants admit that the Regulations of the Civil Aeronautics Board provide that the name used by an Air Freight Forwarder should not be contrary to the public interests and should not constitute an unfair or deceptive practice or method of competition in Air Transportation.

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15. In answer to Paragraph 17, said Defendants deny each and every allegation thereof.

Wherefore Defendants Pray that judgment be rendered against Plaintiff on its complaint and that its complaint be dismissed with costs allowed to Defendants.

COUNTERCLAIM

COUNT I

[Filed June 28, 1955]

As a counterclaim Defendant, City Bonded Messenger & Trucking Service, Inc., praying for the relief hereby sought avers:

1. Defendant, City Bonded Messenger & Trucking
42 Service, Inc., is a corporation organized and existing under and by virtue of the laws of the State of Illinois, with its principal place of business in the City of Chicago, County of Cook, and State of Illinois.

2. Plaintiff is a corporation organized and existing under the laws of the State of California, with a place of business in the City of Chicago, County of Cook, and State of Illinois.

3. The matter in controversy herein exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars ($3,000.00).

4. For many years and continuously to date, Defendant and its predecessor-in-title have engaged in the business of rendering Messenger Delivery Service including the Special Delivery of various commodities, such as Air Freight, both Intrastate within the State of Illinois and Interstate between the several States of the United States of America.

5. (a) In the year 1942 Defendant's predecessor-in-title selected as its trade and business style, the name City Messenger & Trucking Service, and simultaneously adopted as its service mark, the arbitrary and distinctive words City Bonded with the word City appearing in script and with the words used either alone or in connection with a symbol (Defendant's letterhead showing the service mark incorporated into its corporate name is attached hereto

43 and made a part hereof as Defendant's Exhibit "5"), which service mark Defendant since 1942 has used continuously, openly and notoriously in connection with the sale or advertising of its said services and the rendering of said services in the State of Illinois and in Interstate commerce between the several States.

(b) Defendant has expended large sums of money in extensively advertising and otherwise promoting the sale of its aforesaid services under its above-stated service mark over a wide territory of the United States and particularly in the Chicago area.

(c) Prior to the acts of Plaintiff hereinafter complained of, the sale and advertising of the aforesaid services throughout the said territory has been so extensive that the service mark City Bonded became distinctive of Defendant's services in commerce and became well known to the public throughout a wide territory particularly in the Chicago area, as a commercial signature of Defendant and also as indicating that any service designated by such mark was reliable, fast, courteous and in all other ways desirable.

(d) By reason of the premises, continuously since the year 1942 Defendant has been and still is the exclusive owner of the aforementioned trade name, trade style and service mark as applied to the aforementioned services.

44 Said exclusive ownership has been generally recognized by the purchasing public and by those rendering the same or similar services.

(e) Said service mark has been approved for registration by the United States Patent Office and the certificate of registration is about to be printed by the United States Government Printing Office (Defendant begs leave of the Court to introduce said certificate of registration into the Pleadings as soon as certificate has been printed and becomes available).

6. Plaintiff, well knowing the premises, and with intent to infringe upon the rights of Defendant and unfairly compete with it, has been and still is:

(a) Unfairly competing with Defendant and infringing upon Defendant's rights with respect to said trade name, trade style and service mark in divers ways, and particularly by using a corporate name, trade name and trade style dominated by the word City, namely "City Messenger of Hollywood, Inc.", "City Messenger Air Express" and "City Bonded Messenger" (attached hereto and made a part of this complaint is a circular identified as Defendants Exhibit "6" distributed and published by said Plaintiff without the consent or approval of the Defendant, in which appears in several instances, service marks which are substantially identical to Defendant's service mark).

(b) Infringing upon Defendant's common law rights by using in Interstate commerce and particularly within the Chicago area, without the consent of Defendant, a service mark dominated by the word City in connection with the sale, offering for sale, or advertising of Messenger Delivery Service and Air Freight Forwarding services, which services are not rendered by said Defendant, and by further using the said service mark without the consent of Defendant on Plaintiff's business cards, advertising materials, stationery, signs and similar media used in the sale and advertising of the services.

7. Upon information and belief, Defendant avers that the similarity of Defendant's trade name, trade style and service mark with the trade names, trade styles and service marks used by Plaintiff are such as to lead to inevitable confusion and uncertainty in the minds of the public as to

the parties who are responsible for the conduct of Plaintiff's business, and as to the source of the services rendered by Plaintiff; and to permit the Plaintiff to continue
46 to use any trade name, style or service mark dominated by the word City would necessarily sanction a deception of the public with the result that the Defendant would be unfairly and unlawfully deprived of the valuable goodwill now attached to the use of its trade name, trade style and service marks and would result in irreparable injury and damage to Defendant.

8. Defendant avers that it possesses a very valuable credit and financial standing and reputation for integrity and fair dealing in trade circles and in the public minds, which is now and will continue to be impaired and damaged by the Plaintiff's use of any name, style or mark dominated by the word City.

9. Defendant avers upon information and belief that the Plaintiff has profited and will continue to profit by its unfair and unlawful use of the name, style and mark City Messenger in connection with its business, by reason of the assumption and belief on the part of the public that the Defendant is in some way or manner identified with the business of the Plaintiff.

10. Defendant avers, upon information and belief, that Plaintiff, in adopting the word City as part of its corporate name, did so with full knowledge of Defendant's use of the word as the dominating part of its trade name, trade style and service mark and with full knowledge
47 of the extent and manner of Defendant's business as set forth above; and that its use of such word as a part of its corporate name, trade style and service mark and in connection with the conduct of its business, was and is with the unfair and unlawful intent and purpose of creating in the minds of persons dealing with Plaintiff

the impression and belief that Plaintiff is in some way connected with or constitutes a part of Defendant's business, and was intended for the purpose of profiting by the good standing and reputation which Defendant and its services have long enjoyed.

11. Defendant avers that the use by Plaintiff of the word City as part of its corporate name and in the conduct of its business, has heretofore resulted in serious injury and damage to Plaintiff of an irreparable nature.

Wherefore, Defendant prays:

(a) A preliminary and also a perpetual injunction restraining Plaintiff, its agents, servants, employees, and attorneys and all acting under and through them, and each of them, from directly or indirectly:

I. Using the word City, or any other simulation of the word in connection with the business conducted by it.

II. Doing anything having the effect of representing that Plaintiff's services emanate from Defendant.

48 (b) The surrender for destruction of all matter bearing a name, style or mark including the word City in Plaintiff's possession.

(c) An accounting of profits and damages.

(d) An award of costs against Plaintiff.

(e) Such other relief as may be justified.

62 AMENDMENT TO DEFENDANT'S COUNTERCLAIM.

COUNT III

[Filed August 12, 1955]

Now comes Defendant, City Bonded Messenger & Trucking Service, Inc., and in amendment to its Counterclaim praying for the relief hereby sought, avers:

1. Defendant re-alleges Paragraphs 1, 2 and 3 of Count I of the Counterclaim.

2. As an additional ground for jurisdiction of this Court, Defendant alleges that it is based upon infringement of its service mark used in commerce among the
63 several States of the United States and upon infringement of said service mark duly registered in the United States Patent Office in accordance with the Trade Mark Act of July 5, 1946.

3. Defendant re-alleges Paragraph 4 of Count I of the Counterclaim.

4. Defendant re-alleges sub-paragraphs (a), (b), (c) and (d) of Paragraph 5 of Count I of the Counterclaim.

(e) Said service mark "City Bonded" has been duly registered in the United States Patent Office for Messenger Delivery Service; Special Delivery of Various Commodities—namely, News Releases, Advertising Copy, Air Line and Railroad Tickets, Radio Transcriptions, Graphic Art Industries, Samples, Air Freight, Displays and Blow-ups; Drayage and General Trucking, Hauling and Moving, under the Trade Mark Act of 1946, Registration No. 609,732, dated July 26, 1955. Said Registration No. 609,732 is now in full force and effect, and said registration of the service mark shown therein and the goodwill and the business appurtenant thereto are the property of Defendant.

5. Plaintiff, well knowing the premises and with intent to infringe upon the rights of Defendant, has been and still is infringing upon United States Patent Office Service Mark Registration No. 609,732 by;

64 (a) Using in Interstate commerce without the consent of Defendant, a service mark dominated by the word "City" in connection with the sale, offering for sale, or advertising of Messenger Delivery Service, including the Special Delivery of Air Freight, not the services of Defendant.

(b) Applying the aforementioned service mark to signs, letterheads, brochures and advertisements intended to be used in connection with the sale or advertising of Messenger Delivery Service including the Special Delivery of Air Freight in Interstate commerce.

6. Upon information and belief, Plaintiff's predecessor-in-title, a firm consisting of members who are now the officers and principal stockholders of Plaintiff, was formed during the year 1947 with Plaintiff corporation being formed during the year 1951, and Plaintiff and its predecessor-in-title then knew of Defendant, its service mark and the high quality and popularity of its services; that thereafter Plaintiff with intent to appropriate to their own use and benefit the large good will of Defendant and its predecessors, pertaining to said mark, adopted Defendant's said service mark in substantially its identical form, including the identical script type of printing and the symbols comprising a running messenger and a speeding automobile, in connection with the sale and advertising in Interstate commerce of services which are identical with Defendant's services.

65 7. That the services which the Plaintiff renders under the infringing service mark is of an inferior quality than the services which the Defendant and its predecessors-in-title have rendered under said service mark; that the aforesaid acts of Plaintiff were without the consent of the Defendant and constitute infringement of the Defendant's service mark.

8. That Plaintiff very recently has opened a place of business in the City of Chicago under the name "City Messenger Air Express", and engaged in the service of Special Delivery of Air Freight using in connection with the sale and advertising of said services, a service mark substantially identical to Defendant's service mark; that the aforesaid acts of Plaintiff were without the consent of Defendant and constitute infringement of Defendant's

service mark; that Plaintiff in effect has adopted in its business the word "City" in the identical style of lettering as registered to Defendant; and that said acts constitute infringement of the exclusive right of the Defendant to use its said service mark which has been duly registered in the United States Patent Office under the Trade Mark Act of July 5, 1946.

9. That notwithstanding repeated formal protests sent by Defendant's attorneys to Plaintiff by registered mail (a copy of the latest such letter is affixed hereto as Defendant's Exhibit "7"), Plaintiff has persisted in its
66 unlawful and infringing use of said trade name and service mark, and refuses to discontinue the unlawful use.

10. Defendant avers that it possesses a very valuable credit and financial standing and reputation for integrity and fair dealing in trade circles and in the public mind, which is now and will continue to be impaired and damaged by the Plaintiff's use of any trade name or service mark dominated by the word "City".

11. Defendant avers upon information and belief that Plaintiff has profited and will continue to profit by its unfair and unlawful use of the trade names "City Messenger of Hollywood" and "City Messenger Air Express", or the service marks "City Messenger" in connection with its business, by reason of the assumption and belief on the part of the public that the Defendant is in some way or manner identified with the business of the Plaintiff.

Wherefore, Defendant prays:

(a) A preliminary and also a perpetual injunction restraining Plaintiff, its agents, servants, employees, and attorneys and all acting under and through them, and each of them, from directly or indirectly:

67 I. Using the word "City", or any other simulation of the word in connection with the business conducted by it.

II. Doing anything having the effect of representing that Plaintiff's services emanate from Defendant.

(b) The surrender for destruction of all matter bearing a name, style or mark including the word "City" in Plaintiff's possession.

(c) An accounting of profits and damages.

(d) An award of costs against Plaintiff.

(e) Such other relief as may be justified.

City Bonded Messenger & Trucking Service, Inc., Irving Mansfield and Nadine Mansfield
By Silverman & Mullin
105 West Adams Street
Chicago 3, Illinois

August 11, 1955

68 DEFENDANT'S EXHIBIT "7".

(Letterhead of)

SILVERMAN & MULLIN

July 28, 1955

Certified Mail—

Return Receipt Requested

City Messenger of Hollywood, Inc.
and City Messenger of Hollywood, Inc.
d b a City Messenger Air Express
845 South Wabash Avenue,
Chicago, Illinois

Gentlemen:

Supplemental to the notice of infringement and request to cease and desist from the unfair competitive practices resulting from your unauthorized use of a trade name and

service mark dominated by the word City which was sent to you last fall on behalf of my client, City Bonded Messenger & Trucking Service, Inc., of Chicago, Illinois, I have been instructed to advise you as follows:

1. My client's service mark has now been registered by the U. S. Patent Office for Messenger Delivery Service including delivery of Air Freight. Certificate of Registration No. 609,732 has been issued therefor to my client.
2. Your continued use of a trade name and service mark dominated by the word City comprises an infringement of my client's service mark in accordance with the United States Statute.

You are, therefore, requested to immediately cease and desist from any further infringements of the aforementioned service mark. You are further requested to furnish me with an accounting of each and every transaction which you have engaged in in which a trade name and/or service mark was used containing the dominant word City and/or a symbol comprising a speeding car or truck and a running messenger.

Failure to comply immediately with the aforementioned request will force my client to take immediate legal action to enjoin the aforementioned infringements.

Yours very truly,

/s/ Eli Mullin

EM:jb

ccs: Blanksten & Lansing
City Bonded Messenger &
Trucking Service, Inc.

70

IN THE UNITED STATES DISTRICT COURT

(Civil Action—No. 55 C 575)

ANSWER TO COUNTS I AND III OF DEFENDANT'S COUNTERCLAIM

[Filed September 1, 1955]

Now comes the plaintiff, City Messenger of Hollywood, Inc., a California corporation doing business under the trade name of City Messenger Air Express, by Blankensten and Lansing, its attorneys, and in answer to Counts I and III of the Counterclaim of the defendant, City Bonded Messenger & Trucking Service, Inc., states as follows:

1. Plaintiff admits the allegations of Paragraphs 1, 2 and 3 of Count I of said defendant's Counterclaim, but further states the fact to be in answer to Paragraph 2 of said Count I that the plaintiff is licensed to do business as a foreign corporation in the State of Illinois.

2. In answer to Paragraph 4 of Count I of said defendant's Counterclaim, the plaintiff admits that the said defendant has engaged in the business of rendering mes-
71 senger delivery service, except that said plaintiff has no knowledge sufficient to form a belief as to the number of years that the said defendant and its alleged predecessor-in-title have been engaged in said business, and, therefore, denies the same and demands strict proof thereof by said defendant.

3. In answer to Paragraph 5 (a), (b), (c) and (d) of Count I of said defendant's Counterclaim, the plaintiff denies each and every allegation contained therein, and more specifically denies that the said defendant is the owner of or has any property rights in the trade name and style denoted as "City Messenger & Trucking Service", or in the service mark denoted as "City Bonded".

4. In answer to Paragraph 5 (e) of Count I of said defendant's Counterclaim, plaintiff admits that the said defendant did on July 26, 1955, purportedly register said service mark denoted as "City Bonded" with the United States Patent Office.

5. The plaintiff denies each and every allegation contained in Paragraphs 6, (including sub-paragraphs 6 (a) and 6 (b)), 7, 8, 9, 10 and 11 of Count I of said defendant's Counterclaim.

6. Plaintiff admits the allegations of Paragraph 1 of Count III of said defendant's Counterclaim, but further states the facts to be that the plaintiff is licensed to do business as a foreign corporation in the State of Illinois.

7. Plaintiff denies the allegations of Paragraph 2 of Count III of said defendant's Counterclaim.

8. In answer to Paragraph 3 of Count III of said defendant's Counterclaim, the plaintiff admits that the said defendant has engaged in the business of rendering messenger delivery service, except that said plaintiff has no knowledge sufficient to form belief as to the number of years that the said defendant and its alleged predecessor-in-title have been engaged in said business, and, therefore, denies the same and demands strict proof thereof by said defendant.

9. In answer to Paragraph 4 of Count III of said defendant's Counterclaim (which re-alleges sub-paragraphs (a), (b), (c) and (d) of Paragraph 5 of Count I of the Counterclaim), the plaintiff denies each and every allegation contained therein.

10. In answer to sub-paragraph (e) of Paragraph 4 of Count III of said defendant's Counterclaim, the plaintiff admits that the alleged service mark "City Bonded" has been registered in the United States Patent Office but denies that the said defendant has any property right in the same.

11. In answer to Pararaph 5, and sub-paragraphs (a) and (b) thereof, of Count III of said defendant's Counterclaim, the plaintiff denies each and every allegation contained therein, and specifically denies that it is infringing upon said defendant's alleged service mark.

12. In answer to Paragraph 6 of Count III of said defendant's Counterclaim, the plaintiff denies each and every allegation contained therein, and specifically denies that it appropriated to its own use any service mark belonging to the said defendant.

13. The plaintiff denies each and every allegation contained in Paragraph 7 of Count III of said defendant's Counterclaim.

72a 14. In answer to Paragraph 8 of Count III of said defendant's Counterclaim, the plaintiff admits that it is operating a place of business in the City of Chicago under the name "City Messenger Air Express", and that it is engaged in the service and business of an Air Freight Forwarder pursuant to authority granted it by the Civil Aeronautics Board, as set forth in plaintiff's Complaint. Said plaintiff denies, however, that plaintiff's use of its legally constituted name, and its manner of use thereof, in any way constitutes an infringement of any alleged property right of said defendant in said defendant's alleged service mark. The plaintiff further specifically denies that said defendant has any exclusive property right in the use of said defendant's alleged service mark, and alleges and states the fact to be that said plaintiff's predecessor-in-title was actively using in trade and commerce the trade name and trade style of "City Bonded Messenger & Express", and a service mark containing the words "City Bonded" accompanied by a picture of a delivery truck and a messenger, for a number of years prior to said defendant's first alleged use in September, 1942. The

plaintiff further states and alleges the facts to be that the said defendant did not begin to use the service mark consisting of the running messenger, delivery truck and the words "City Bonded" until on or about the year 1950, and that said defendant's use of said trade name and service mark was and is in violation of plaintiff's common law property rights in said trade name and service mark.

15. In answer to Paragraph 9 of Count III of said defendant's Counterclaim, the plaintiff denies that it is unlawfully using the said trade name and service mark.

73 16. Plaintiff denies each and every allegation contained in Paragraph 10 of Count III of said defendant's Counterclaim.

17. In answer to Paragraph 11 of Count III of said defendant's Counterclaim, the plaintiff denies that it is engaged in any unlawful use of the trade names "City Messenger of Hollywood" and "City Messenger Air Express" or the service marks "City Messenger" in connection with plaintiff's business.

Wherefore, plaintiff prays that judgment be rendered against said defendant, City Bonded Messenger & Trucking Service, Inc., on Counts I and III of defendant's Counterclaim, and that its said Counterclaim be dismissed with costs allowed to said plaintiff.

City Messenger of Hollywood, Inc.,
a California corporation, doing
business under the trade name of
City Messenger Air Express

By Blanksten & Lansing
33 North LaSalle St.
Chicago 2, Illinois
STate 2-7828

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IN THE UNITED STATES DISTRICT COURT

(Civil Action—No. 55 C 575)

DEFENDANTS' AMENDED COUNT II OF COUNTERCLAIM

[Filed September 27, 1955]

Defendants, City Bonded Messenger & Trucking Service, Inc., Irving Mansfield and Nadine Mansfield, for their second claim against Plaintiff aver:

1. Defendant, City Bonded Messenger & Trucking Service, Inc., is an Illinois corporation. The Defendants, Irving Mansfield and Nadine Mansfield, are both citizens of the State of Illinois, residing in the City of Chicago, County of Cook, and State of Illinois.

2. Said Defendants re-allege Paragraphs 2 and 3 of Count I of the Counterclaim and specifically allege
76 that the matter in controversy exceeds the sum of Three Thousand Dollars ($3,000.00), exclusive of interest and costs.

3. During the latter part of 1953 and on several occasions during 1954 in Chicago, Illinois, during April, 1954, in New York and during October, 1954, in Los Angeles, California, Plaintiff, City Messenger of Hollywood, Inc., through its officers, Benjamin Fullman, Sidney Fullman and Elliot Fullman, falsely and fraudulently represented to the Defendants that said Defendant would join with it in the ownership and operation of an Air Freight Forwarding business to be known as City Messenger Air Express with Defendants to take charge of the operations of said business in Chicago, Illinois. Thereafter said Plaintiff through its said officers continued to falsely and fraudulently represent that said Air Freight Forwarding business had in fact been organized under said name, City

Messenger Air Express, with Defendants as part owners thereof, and said Plaintiff's officers proceeded to act accordingly as though said Air Freight Forwarding business did exist and as though Defendants were in fact part owners thereof, demanding that Defendant fulfill its duties and perform its alleged "part of the bargain".

4. Plaintiff represented that as a modus operandi for achieving the joint ownership and operation of the aforementioned Air Freight Forwarding business, Plaintiff, together with Defendants, would organize a new corporation to be known as City Messenger Air Express, which corporation would conduct the Air Freight Forwarding business and the stock of which corporation would be owned equally by Plaintiff and or its officers and Defendants. Thereafter Plaintiff through its officers falsely and fraudulently represented to Defendant that it had applied in the name of the new corporation, City Messenger Air Express, to the Civil Aeronautics Board for permission to conduct said Air Freight Forwarding business. Notwithstanding said representations, Plaintiff applied for permission to conduct said Air Freight Forwarding business to the Civil Aeronautics Board in the name of Plaintiff only, namely City Messenger of Hollywood, Inc., doing business as City Messenger Air Express. Thereafter on May 18, 1954, in a telegram (see Defendants' Exhibit "7" herewith attached and made a part of this Counterclaim), Plaintiff falsely and fraudulently represented to Defendant Irving Mansfield that said CAB registration had been approved and issued to said new corporation, City Messenger Air Express, when in fact said CAB registration approval had been issued to Plaintiff only, namely City Messenger of Hollywood, Inc., doing business as City Messenger Air Express, as evidenced by Plaintiff's own Exhibit "A" (see Plaintiff's Complaint).

5. Believing the representations to be true and relying on the same, Defendant expended large sums of money, in excess of Three Thousand Dollars ($3,000.00), in extending credit to Plaintiff, in guaranteeing the credit of
78 Plaintiff to United Air Lines, Inc., Capital Airlines, Inc. and others, in purchasing at the request of Plaintiff large numbers of printed forms of the type necessary for use in the Air Freight Forwarding business, large numbers of advertising circulars and materials, in purchasing office supplies, furnishing telephone service, office space, trade terminal space, equipment, personnel and similar supplies, equipment and services for the benefit of the Plaintiff, circularizing its customers advising them of the services to be rendered by the new business, affording the use of Defendant; City Bonded Messenger & Trucking Service, Inc.'s, charge accounts such as Railway Express account, Western Union and the like, for the benefit of Plaintiff, and refusing to furnish services in return for substantial remuneration to competitive Air Freight Forwarders.

6. These representations were false and were known by the Plaintiff to be false at the time they were made and were made with the intent to induce the Defendant to act thereon and with intent to deceive and defraud Defendant, Plaintiff never intending to permit Defendant to join in the ownership and operation of the aforementioned Air Freight Forwarding business.

7. The profits from Messenger Delivery Services, which were it not for the fraud and deceit of Plaintiff, Defendants would have obtained by rendering Air Freight Mes-
79 senger Service to competitive Air Freight Forwarders and services and monies expended by Defendant on behalf of Plaintiff, total in amount Ten Thousand Dollars ($10,000.00) to Defendant's damage.

Wherefore, Defendant prays judgment for Ten Thousand Dollars ($10,000.00) together with the cost of this action and for such other and further relief as to this Court may seem just and proper.

City Bonded Messenger & Trucking Service, Inc., Irving Mansfield and Nadine Mansfield
Silverman & Mullin
By Eli Mullin
105 West Adams Street
Chicago 3, Illinois

80 DEFENDANTS' EXHIBIT "7"

WESTERN UNION

W. P. Marshall, President

CTB003 DEA672 NOA726 LH581

1954 May 18 AM 1 12

LLLU470 NL PD PD WUX TDL Hollywood Calif 17=

Irving Mansfield, City Bonded Messenger, 193 North La-Salle Chgo=

C.A.B. registration approved and issued to City Messenger Air Express effective May 22 1954. Imperative rush be put on printing of way bills. Contact CARCO. Hold them to promise of putting rush on this order. Copy of new tarrif will be mailed you in few days=

City Messenger Service Ben Fullman=

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IN THE UNITED STATES DISTRICT COURT

(Civil Action—No. 55 C 575)

ANSWER TO AMENDED COUNT II OF DEFENDANTS' COUNTERCLAIM

[Filed October 11, 1955]

Now comes the plaintiff, City Messenger of Hollywood, Inc., a California corporation doing business under the trade name of City Messenger Air Express, by Blaukstein and Lansing, its attorneys, and in answer to Amended Count II of defendants' Counterclaim states as follows:

1. Plaintiff admits the allegations of paragraphs 1 and 2 of Amended Count II of defendants' Counterclaim.

2. Plaintiff denies each and every allegation of paragraph 3 of Amended Count II of defendants' Counterclaim, and states the facts to be that no contractual agreement was ever effectuated or ever entered into between the plaintiff and the said defendants relative to the said defendants joining with the plaintiff in the ownership and operation of an air freight forwarding business.

3. In answer to paragraph 4 of Amended Count II of said defendants' Counterclaim, the plaintiff admits sending the telegram identified as defendants' Exhibit 83 "7", but otherwise denies each and every allegation of said paragraph. The plaintiff states the facts to be that no contractual agreement was ever effectuated or ever entered into between the plaintiff and the said defendants relative to the said defendant joining with the plaintiff in the ownership and operation of an air freight forwarding business.

4. Plaintiff denies each and every allegation of Paragraphs 5, 6 and 7 of Amended Count II of defendants' Counterclaim, and denies that said Amended Count II of

defendants' Counterclaim states a claim or cause of action upon which relief can be granted.

Wherefore, Plaintiff prays that judgment be rendered against said defendants on Amended Count II of defendants' Counterclaim, and that said Counterclaim be dismissed with costs allowed to said plaintiff.

City Mesenger of Hollywood, Inc.,
a California corporation, doing business under the trade name of City Messenger Air Express
By Blanksten and Lansing
33 North La Salle St.,
Chicago 2, Illinois
STate 2-7828

95 This being the day to which this cause was continued for further trial again come the parties by their counsel and the trial proceeds and at the close of plaintiff's case defendants by their counsel enter their motion for a finding in their favor and upon due consideration the court being fully advised it is

Ordered that said motion be and the same hereby is denied and the defendants Nadine Mansfield and Irving Mansfield and Irving Mansfield as defendants be and the same hereby is granted and that this cause be and it hereby is dismissed as to defendants and the hour of adjournment having arrived it is

Further Ordered that said motion to dismiss Nadine Mansfield as defendants be and the same hereby is granted and that this cause be and it hereby is dismissed as to defendants and the hour of adjournment having arrived it is

Ordered that this cause be and the same hereby is adjourned to February 25, 1957 at 11:00 a.m. for further trial.

96

IN THE UNITED STATES DISTRICT COURT

(Civil Action—No. 55 C 575)

AMENDMENT TO DEFENDANTS' COUNTER CLAIM

Count IV

[Filed February 28, 1955]

Now come Defendants City Bonded Messenger Service, Inc., and City Bonded Trucking Company, Inc., and in amendment to their counter claims and pursuant to the order of this Honorable Court, made during the trial of the issues on February 27, 1957, granting leave to said Defendants to amend their counter claim to conform
97 with the proofs and praying for the relief hereby sought, avers:

1. Defendants City Bonded Messenger Service, Inc., and City Bonded Trucking Company, Inc., are corporations organized and existing under and by virtue of the laws of the State of Illinois, with their principal place of business in the city of Chicago, County of Cook, State of Illinois.

2. Defendants re-allege paragraphs 2 and 3 of Count I of the counter claim.

3. That on or about September 7, 1954, at Los Angeles, Los Angeles County, California Defendants offered to purchase for $12,500.00 an undivided one-half interest in all of the assets owned by and in the name of the Plaintiff City Messenger of Hollywood, Inc., doing business as City Messenger Air Express, including the good will of the business attaching thereto and the right to engage in the business as an air freight forwarder under Civil Aeronautics Board letter of registration No. 163.

98 4. That Plaintiff then and there accepted said offer.

5. That defendants have done and performed all

things by them to be performed under the terms of said contract.

6. That Plaintiff, though often there unto requested, has failed and refused to perform the terms of said contract on its part to be performed, in that it has refused to deliver to Defendants said one-half interest in all of the assets owned by and in the name of the Plaintiff City Messenger of Hollywood, Inc., doing business as City Messenger Air Express, including the good will of the business attaching thereto and the right to engage in the business as an air freight forwarder under Civil Aeronautics Board letter of registration No. 163.

7. That by reason of Plaintiff's said failure and refusal to perform said contract, Defendants have sustained great damage in that they were denied profits from messenger delivery services which were it not for said contract, Defendants would have obtained, by rendering air freight messenger service to competitive air freight forwarders, including Emery Air Freight Forwarders, and in that they have received no compensation for services and monies expended by Defendants on behalf of Plaintiff, by reason of Defendants' performance of the terms of said contract; all to Defendants' damage in the sum of $16,526.83.

99

Wherefore Defendants pray judgment for $20,000.00 together with the cost of this action, Attorney's fees and for such other and further relief as to this Court may seem just and proper.

City Bonded Messenger Service, Inc.
City Bonded Trucking Company, Inc.
By Silverman & Mullin

Attorneys for Defendants
105 West Adams Street
Chicago 3, Illinois

Proceedings had before the Honorable John P. Barnes on February 15, 1957. There appeared Normand A. Cohen, attorney for the plaintiff, Kenneth F. Burgess, James E. S. Baker, and H. Blair White, attorneys for Illinois Bell Telephone Company and the Reuben H. Donnelley Corporation, and I. Irving Silverman and Eli Mullin, attorneys for City Bonded Messenger and Trucking Service, Irving Mansfield and Nadine Mansfield.

[February 18, 1957]

IRVING MANSFIELD, called by the plaintiff as an adverse witness, having been duly sworn, was examined and testified as follows:

Direct Examination by Mr. Cohen.

My name is Irving Mansfield. I am 50 years old. I reside at 5210 Blackstone, Chicago, Illinois. I am president of the City Bonded Messenger and Trucking Service. I have no other business affiliations in the field of messenger and trucking service. I own stock in City Bonded Messenger and Trucking Service, Inc. City Bonded Trucking Company is a separate corporation. I am also president of that company and I own stock in that company. City Bonded Messenger & Trucking Service, Incorporated, and City Bonded Trucking Company are operated at 193 North La Salle Street and 216 West Hill Street. Both companies are operating at the Prudential Building.

I first went into the messenger service and trucking business around 1942 or 1943. Prior to that time I was employed by another messenger service and I was also a stockholder in another messenger service company. Prior to 1942 or 1943, I was employed by Cannonball for 5 years and previously I was a stockholder of Cannonball.

I entered the messenger service and trucking industry
24 in the middle '30's. Prior to that, I had no association with that industry.

25 In 1942 I was the sole owner of the business. I operated under the name of City Bonded Messenger Service. I filed a certificate with the Clerk of Cook County under the assumed name.

26 In 1944 we used the word "City" in script. Ever
27 since the inception of my business I have used some form of messenger boy in connection with my business.

29 In 1948 we first used the mark of the boy running through the "C" in the word "City" and underneath that is "Bonded". Thereafter, I used the boy running through the letter "C" in "City", with others. Before that I used a messenger boy running through the word "City" or thereabouts, with a motorcycle or bicycle.

30 I don't recall which now. I used the messenger boy alone, I would say on and off since 1943. I used different marks from the time I started in business until now, on and off. Since 1948 I used the mark of the boy running through the "C" in the word "City" and underneath that "Bonded".

In 1945 I might have had a social meeting with Ben
31 Fullman. In August, 1951, I might have received a letter from Ben Fullman. I couldn't place the date. I received hundreds of letters, and vice-versa, I sent him hundreds of letters. As to when this correspondence took place, is hard to say. We have been friends of long
33 standing, for thirty years, and I couldn't give you definite dates. After Mr. Fullman left Chicago, which was in 1937, I don't think we had any contact. In fact, I am sure we had no contact until the war years of probably '43 and '44.

I recall having a meeting with Mr. Roper of Mercury Messenger Service of New York and Mr. Ben Fullman in Chicago, in 1951. The exact date I could not give you. As a result of that meeting and possibly others Mr. Roper of Mercury Service, Mr. Fullman and I entered into a verbal agreement to associate ourselves with the Diners' Club for the rendition of messenger service in three cities, New York, Chicago and Los Angeles. As a result of all that,
34 all three concerns were listed in the Diners' Club credit book, and I think from the inception of our going into this business with Diners', they published one of the first magazines or periodicals, and I think we were there. I had conversations with Benjamin Fullman, Sidney Fullman and Elliot Fullman relative to the City Messenger Air Service or City Messenger Air Express. I think we had conversations or rather we had correspondence prior to 1953. We met in the early part of 1953. It possibly could have
35 been the latter part. I believe I had a meeting or a conversation with one of the Fullmans in March of 1954. Again in the month of April 1954, I had a conversation with one of the Fullmans. I had conversations with one or more of the Fullmans in May, June, July and August of 1954. They were in my office constantly. They had office space there at that time. I possibly had a conversation with Ben Fullman during the month of October, 1954. I can't recall. I had a conversation with Ben Fullman in his office in Los Angeles. I think it was in September 1954, or an earlier date.

36 I have seen a document like plaintiff's Exhibit 1
37 That is a City Messenger Air Express air bill. I was responsible for having these printed up. I had them printed up for Mr. Fullman prior to March, 1954. I would say he ordered it and I was responsible for having them printed up. Mr. Fullman sent me the proofs to have
38 these printed up in Chicago. It was possibly the latter

part of 1953. Some of these air bills were delivered to my office at 193 North LaSalle from the PARCO Company. I would say about 5,000 air bills. The telephone number of Randolph 6-6391 was ordered by either Elliot Fullman or Ben Fullman. I ordered it directly. I
39 received a request from Elliot or Ben Fullman and in turn I made the request with the telephone company. They gave service on that number. This telephone was situated at our office at 193 North LaSalle Street.

On January 19, 1955, I recall receiving a phone call from an officer or person in charge of the Illinois Bell Telephone Company, who asked me if I would agree to give up that number. I said no I would not give up that number because that number was identified with the City Bond Messenger & Trucking Service and we were receiving our own calls as well as calls for City Air Service or City
40 Air Express over that phone number.

Q. Now, directing your attention to a lawsuit that was pending in the Municipal Court of Chicago, No. 55 M 2286, do you know who the parties to that lawsuit were?

* * *

By Mr. Mullin: Your Honor, I believe that case has been settled, and the facts that were brought out in that case have nothing to do with the facts in this case. This is a separate lawsuit.

* * *

41 By Mr. Cohen: Yes, it has been settled.

* * *

42 By the Court: Well, I don't want to try any other lawsuit if it is unnecessary. Does anybody plead *res judicata* or anything of that kind?

* * *

By Mr. Cohen: All right. I will withdraw that question.

42 Witness continues: City Bonded Messenger & Truck-
ing Service rendered services to City Messenger Air
Express during the months of June, July, August, Septem-
ber, October, and part of January 1954 and 1955. And
43 I think also in May of 1954. These services consisted
of local delivery service to and from the airport within
a radius of 50 miles of Chicago. We broke bulk, repack-
aged and shipped out. The first couple of months we ren-
dered bills for these services to the plaintiff corporation,
but I had a conversation with Mr. Fullman and inasmuch
as we were entering into an agreement to go into business
together, he said "You know I haven't any money to pay
any of these bills, and inasmuch as we are going into busi-
ness I would suggest that you hold them to a later date
44 until we go into business together."

Plaintiff's Exhibit 1 received in evidence.

46 *Cross Examination by Mr. Mullin.*

On January 19, 1955, I received a telephone call from
an officer of the telephone company asking me as to whether
I would object to discontinue that number and I replied
that I needed that telephone listing because I was receiving
calls for the messenger and trucking phase of that business
on that number. We have a very busy office. We have a
switchboard with about 10 lines coming in and that is over-
crowded.

We tried to educate our customers to call us on some of
these air shipments on this particular number, but inas-
much as they knew the number was the same as the City
Bonded Messenger Service, they didn't stop but would
47 call 6004 or RAndolph 6291. They would just call both
numbers.

48 About 1953, Mr. Fullman approached me by tele-
phone and said that they had a good idea to apply for
a C.A.B. permit to operate air freight forwarding. He

asked me if I was interested and I said very much so. He said, "You know we have the ground work, I have an office in Los Angeles and you have an office, and we are contemplating opening an office in New York." That was in the early part of '53. I also received many letters re-
49 garding this proposition at a later date. Mr. Ben Fullman asked me to come to New York and advised me that they had now opened their New York office. He wanted me to pay him a visit and see what the operation was. I flew to New York and spent about a week
50 there with Mr. Fullman. I don't think Ben was there at the time. I think Elliot and Norvin Fullman were there at the time in New York. They explained the
51 operation to me in New York. When I got back to Chicago, a few days later I contacted Mr. Ben Fullman who was at the Los Angeles office and told him I had been to New York and had seen his operation, and I thought they had a nucleus of something real good and I was very much interested. Thereafter, there was an exchange of correspondence and many telephone calls back and forth. Mr. Ben Fullman invited me to come to Los Angeles to see the operation out there. That was in the early part of August. At that time I couldn't get away, but I arranged to fly out to California in the early part of September. I think it was over Labor Day of 1954. When
52 I arrived in Los Angeles I contacted my brother who was a practicing attorney and a C.P.A. out there. He had already known about this proposition that we were entering into and I asked him to meet me and go over to Mr. Fullman's office. I think it was located then at 1414 Cole Place. We went over there together that day. My brother and Ben Fullman and I discussed the proposition of going into a partnership. At first he wanted to merge City Bonded Messenger & Trucking Service of Chicago
53 with City Messenger of Hollywood. This took place in

Mr. Fullman's office in Los Angeles. I didn't know too much about their operation out there. I asked advice of my brother at the time and he said, "Well, first, I don't know anything about their financial conditions, 54 secondly, I wouldn't suggest a merger." So I think my brother asked him for a financial statement at the time and Mr. Ben Fullman gave my brother a financial statement. Of course, my brother being a Certified Public Accountant looked it over. I was not familiar and wouldn't know too much about it myself. He said to me in the presence of Ben Fullman, "These people have no assets. How can you enter into an agreement of this kind." Ben Fullman said "True, we have no assets." That immediately put a damper on the merger part of the proposition, so Mr. Ben Fullman said, "Well, in what other way can we get together?" So my brother suggested that Mr. Fullman already had 55 the Civil Aeronautics Board permit at the time. My brother wanted to form a new corporation and Ben Fullman informed him that the CAB certificate was not transferable, and we could not enter into an agreement at that time. My brother suggested that I could buy into the present corporation of City Messenger of Hollywood. Ben Fullman said that it cost him in the neighborhood of $12,000 to $15,000, in traveling expenses and legal fees to obtain the CAB permit. We agreed that I would put up $12,500.00 and they would put up the assets and the CAB permit of City Messenger of Hollywood. We were to form a corporation and I was to receive 50% of the stock. 56 It was agreed upon by Ben Fullman and myself that would be the deal.

60 The certificate was issued under the name of City Messenger Air Express and it was not transferable. The only alternative we had, then, was to talk about a merger. My brother took over and he started asking Ben Fullman questions regarding their financial status and Ben

Fullman told him "We have no assets." My brother then told me, "Well, I think that is a bad proposition for you. You will just have to forget about it." My brother asked Mr. Fullman, "What do you think the certificate is worth?" He said, "Well, the time and effort and running back and forth to Washington. We spent a little over $12,000.00." My brother asked, "Well, do you think $12,500.00 would be an equitable amount?" and Fullman said, "Yes."

61 So it was agreed that I would put up $12,500.00 and they would put up the certificate and I was to get 50% of the stock of the corporation. It was not reduced to

62 writing. I had to come back to Chicago, and my brother who is a resident of California, and Ben Fullman were to consummate the deal after I left. While I talked to Mr. Fullman, during intervals, Mrs. Fullman would come in and out of the office.

67 The arrangement regarding the Diners' Club originated out in Los Angeles. I think the Fullmans were responsible for it. It was an arrangement whereby we were to render messenger service for the members of the Diners' Club and to be charged by the members of the Diners' Club. I think Mercury in New York participated. We here, City Bonded, participated and City Messenger of Hollywood participated. Each city was to handle

68 its own calls and to be billed to the Diners' Club and we were to be paid accordingly. It was an unsuccessful venture and I think they kept us on a month or two and just discontinued it. We were operating as individual companies.

As to my conversations with Mr. Fullman in September of 1954, there was much correspondence.

69 Defendants' Exhibit 1 is a letter sent to me by Ben Fullman and it is signed Ben. This was sent prior

70 to March, 1954, and the letter refers to a visit that Mr. Ben Fullman made to my home. Mr. Fullman was

always welcome in my home. I recall a visit he made to my home at that particular time. There were conversations concerning the air freight forwarding business during his visit at my home. It was prior to March, 1954. My wife, Nadine, was present and my son Robert, Mr. Fullman and I were there. At the time he was on his way to Washington to get a permit to operate. We were going to go into this financially together. They needed Chicago as a point of operation and needed it very badly. He couldn't go to strangers for it, and naturally the first one he could go to was me. We were on a very friendly basis. Mr. Fullman was explaining the procedure of air express, air freight forwarding, and how many million dollars some other companies were doing in this business. We had a pretty good ground operation between the three offices, Los Angeles, New York and Chicago, and we would be very well equipped to enter into this business of air freight forwarding. Mr. Fullman said that we would form a corporation and we would start operating the City Messenger Air Express. He needed my financial assistance to get started on this. They did not have enough money to go through with it, and Mr. Fullman said that was why he was calling on me for financial assistance. I think he remained in my house just over night.

Defendants' Exhibit 2, dated May 13, 1954, is office correspondence from Mr. Fullman which was sent to me, signed "Ben". This was a letter sent to me in regard to a receipt book which I was making up here in Chicago for City Messenger of Hollywood and also for ourselves at the time, and it mentioned something about the terms and conditions that we were to print on the receipts for both companies. There were conversations that we had in regard to those receipt books. The contents of the letter are regarding the receipt books and

how I should set them up. I think I printed 1,000 for New York, 1,000 for Los Angeles and 2,000 for Chicago, and Mr. Fullman at the time supplied the copy and all
78 the necessary details on it. The copy included the names, trademarks, telephone numbers, etc.

Defendants' Exhibit 3 admitted in evidence.

79 Witness continues: Defendants' Exhibit 3 dated July 1, 1954, is a letter that I sent to Ben and states that there is enclosed a new rate chart. We will have 5,000 in the mail, also artwork for book covers. Please okay and return via air mail. It will take 30 to 60 days. Elliot does not want them in New York. Please ad-
80 vise. I received a cut for U. S. Air Express. I recall those rate charts that I mentioned in that letter.

81 I received from Ben Fullman on or about July, 1954, Defendants' Exhibit 4. This is an acknowledgement from Ben regarding the copy of the receipt books.

82 I have used the name "City Messenger Service"
83 ever since we have been in business. We have continued using that same name. We also used City Bonded Messenger & Trucking Service. I believe we began to use that name in 1944 or thereabouts. We also used the name City Bonded Delivery Service. I was an individual doing business under that name when I started. About a year after I was in business I formed a partnership with my wife Nadine. That was around 1944. That continued until 1953 when we formed a corporation "City Bonded Messenger & Trucking Service". The City Bonded Messenger & Trucking Service went on until 1956, I think, and then we formed 2 corporations, one of which is "City Bonded Messenger Service" and one "City Bonded Trucking Service," and those are the two present corporations we are operating now.

85 By Mr. Mullin: Your Honor, I would like to reserve the right to amend the title of the plaintiff, because he has just recently evidently changed his name from "City Bonded Messenger & Trucking Service, Inc." to "City Bonded Messenger Service."

By Mr. Cohen: If your Honor please, I think counsel meant "defendant" and not plaintiff.

By Mr. Mullin: Yes. I am sorry. I feel like a plaintiff.

By The Court: You want to amend your answer?

By Mr. Mullin: Yes, in that respect, since there has been a change in the title.

By The Court: From "City Bonded Messenger & Trucking Service, Inc." to what?

By the Witness: To City Bonded Messenger Service, Inc. and City Bonded Trucking Company, Inc.

By the Court: You have two companies now, have you?

By the Witness: Yes, sir.

86 By the Court: What did you do? Did you organize a new corporation?

By the Witness: Yes. What we really did, the operation got too big, and we had to split up the operation.

By the Court: I know, but you had better find out what he did, Counsel. He probably changed the name.

By Mr. Mullin: Yes, sir, I think that is what he did.

By Mr. Mullin:

Q. Which of these two, City Bonded Messenger Service, Inc. and City Bonded Trucking Service is the successor to the City Bonded Messenger & Trucking Service, Inc.?

A. City Bonded Messenger & Trucking Service, Inc. is a successor of the—what is that question again?

Q. I say, which of these two corporations is a successor to the corporation named as the party defendant here?

A. City Bonded Messenger Service, Inc.

By Mr. Mullin:

I see. That is what we will have to amend to, your Honor.

That is all.

87 By Mr. Cohen: If your Honor please, I think counsel would have no objection if the title of this case should include City Bonded Trucking Company, which is this new company, too.

By Mr. Mullin: They are not a party to this. They are a separate corporation that was formed.

By Mr. Mullin:

Q. Isn't that what you testified to, Mr. Mansfield?

A. Yes, sir.

Redirect Examination by Mr. Cohen.

By Mr. Cohen:

Q. Mr. Mansfield, am I correct in assuming that you formed a separate company just to handle the trucking, and formed a separate company to handle just the messenger service? Is that correct?

A. Yes, that's right.

Q. Whereas before both companies or both operations were in one company, City Bonded Messenger & Trucking Service, Incorporated?

A. They were under one name, but it was a separate operation.

88 By Mr. Cohen: If your Honor please, I believe my request is in line, that the City Bonded Trucking Company should be also made a party defendant without the necessity of issuing summons and trial, or on behalf of all parties.

By Mr. Mullin: We have no objection.

* * *

By the Court: Do you want to put in the answer on behalf of the new company?

By Mr. Cohen: Let the answer of both companies
89 stand, or let the answer filed stand as an answer of both new companies.

By Mr. Mullin: We will stipulate to that, agree to that.

By Mr. Cohen: I will stipulate to that.

Witness continues: I operated a business known as
90 the City Messenger Air Express. The starting was contingent with the operation that we had with the Fullmans of the City Messenger Air Service Express. That started when they notified me that they had the
91 C. A. B. certificate. I think it was March of 1954. I had reference to City Messenger of Hollywood, Inc., doing business as City Messenger Air Epress.

Sometime in January, 1955, I registered with the County Clerk of Cook County an assumed name of City Messenger Air Express.

94 BENJAMIN FULLMAN, called as a witness on behalf of the plaintiff, having been first duly sworn was examined and testified as follows:

Direct Examination by Mr. Cohen.

My name is Ben Fullman. I reside at 1258 North Sweetzer, Los Angeles, California. I am an executive connected with City Messenger Air Express & City Mes-
senger of Hollywood, Incorporated, the plaintiff in
95 this cause. Sidney Fullman is the president, Elliot Fullman is vice-president, Norvin Fullman is secretary and treasurer, and Beatrice M. Fullman is a director of the plaintiff company. I have been associated with the plaintiff corporation since 1951. Prior to that time I was associated with Modern Delivery Service. That was a corporation and I was a stockholder. I was associated with Modern Delivery Service from 1937 to 1948.

96 Between 1948 and 1951 I was associated with Anchor Chemical Company. In January, 1937, I was associated with Twentieth Century Delivery Service in Illinois. It was a corporation and I had stock in that company. I was associated with Cannonball Messenger & Delivery from 1935 to about April of 1937. Twentieth Century was located at 441 East Ohio Street, Chicago.

97 Cannonball Messenger & Delivery was located in the Merchandise Mart in Chicago. After I terminated my association with Cannonball Delivery Service I returned to Los Angeles and went into business under the name of Modern Delivery Service. That company also used the name of City Messenger & Delivery. Modern Delivery Service used the name of City Messenger Delivery Service from a month after our incorporation to 1948. I was

98 an executive of that corporation. I had a financial interest in that company. I owned stock in the company. I was connected with it until 1948. During that time we used the name City Messenger Delivery Service on a continuous basis. Modern Delivery Service developed marks to distinguish it from other companies during the time I was associated with the company. In 1937,

99 we developed a large word in print, "City", with a space in the middle of the letters and it had the word "Bonded" put in the space. Then in 1946, we did away with that and had an advertising agency develop the script, "City", with the character of a boy stepping through the C. The name of the advertising agency that developed this last mark was The Perritt Company. Mr. Perritt was

102 the executive officer of that company. I believe he is the president of the company.

I saw plaintiff's Exhibit 2 bearing the title "Minutes of Special Meeting of the Board of Directors of Modern Delivery Service." I saw it in my office at 1120 South

Olive Street, Los Angeles, California, in 1947. This document came out of the records of Modern Delivery Service. I don't know where those records are, whether they have been destroyed or are still in effect. The plaintiff's Exhibit 2 was in the hands of Sam Chess and Sidney Fullman.
103 The document bears my signature. It was affixed on April 29, 1947. On that day a special meeting of the board of directors of Modern Delivery Service was held. The document represents a true and correct representation of the events of that day.

I have seen plaintiff's Exhibit 3 before. It was made in April 1947. The document came from the records of Fullman and Chess, Sam Chess and Sidney Fullman.
104 It was lodged there from the time that it was executed until now. I recognize the signatures on the instrument. The signatures are those of Sidney B. Fullman, Sam Chess, and C. J. Cullom. C. J. Cullom was the secretary of the corporation at the time. The instrument truly reflects the events and purposes of that document. On April 29, 1947, Modern Delivery Service sold the name of City Messenger Service to Fullman and Chess. I know of my own knowledge that Modern Delivery Service
105 received consideration for the execution of these documents. They received $2500.00, paid in cash. I know of my own knowledge that Fullman and Chess operated under the name of City Messenger Service. They operated right along, and then, in 1951, they incorporated into City Messenger of Hollywood, Incorporated, and it is still in operation.

111 I know of my own knowledge that Modern Delivery Service sold for consideration the use of the name City Messenger Service to Sam Chess and Sidney Fullman. The consideration was a little over $2500 and Modern Delivery Service received that money.

I have seen before Plaintiff's Exhibit 4. It was made in 1937 at my direction. It was sent through the mails. We sent out a thousand of them in and through Los Angeles and Hollywood. The heading "City" with the word "Bonded" in between was our mark at that time. The name of the company at that time was Modern Delivery Service doing business as City Messenger and Express Company. It was the company's mark from about July 1937 to 1946. We used that mark. Modern Delivery Service was a corporation and the corporation was doing business under the assumed name of City Messenger Express Service.

Referring to the reverse side of Plaintiff's Exhibit 4, the cards were printed in 1938. They were distributed in Los Angeles and Hollywood, California, and these also contain the mark of the corporation.

Plaintiff's Exhibit 4 received in evidence.

Witness continues: In the latter part of 1951, I was associated with City Messenger of Hollywood, Incorporated. I saw before the letter which is plaintiff's Exhibit 5. The signature on page 2 of this letter is that of Irving Mansfield. I received this letter through the mails. It was in response to a request I had made to Irving Mansfield to settle up a cooperative ad that our company, City Messenger of Hollywood, and Mercury Messenger Service in New York and City Messenger in Chicago had bought from the Diners' Club. I believe it was about six or seven hundred dollars. That is not my stationery. I believe we got that letter from the Mercury Messenger people in New York.

I can identify Plaintiff's Exhibit 6. It is the Bagattelle Magazine put out by the Diner's Club. I received a copy of it. City Messenger of Hollywood received it. I don't know whether City Bonded Messenger & Trucking Service, Incorporated, received a copy of that.

The corporate mark and advertising of each company appears in that magazine. It is to be found on the outside of the cover. The mark that the City Messenger
126 of Hollywood had was the one that we were using at the time.

127 Plaintiff's Exhibit 6 received in evidence.

Witness continues: In the latter part of 1953, I had occasion, as an officer of the City Messenger of Hollywood, to speak with Mr. Mansfield in Chicago. I believe it was the first week in December 1953. It took place partly in his office and partly in his home. There were no others present at our conversation. There were people around there at the office. I spoke quietly to Mr. Mansfield. At his home, his wife was there, but she went into another room or we went into a different room and
128 talked alone. When I first saw Irving in his office I informed him that this was confidential. A group in Los Angeles applied to the Civil Aeronautics Board for a letter of registration to operate as an air freight forwarder. He replied, "That is very interesting." I informed him, "This has a much larger potential than we have at present in Messenger Service, as it will put us on a national scale, as we have already opened an office in New York City." That was the end of the
129 conversation. The next conversation I had with Mr. Mansfield was March 1, 1954. It was a face to face conversation, which took place in his office at 193 North LaSalle Street in Chicago. It was in the middle of the day. There were several people present. We spoke very quietly. I informed him that I was on my way back
130 from New York and had to go to Washington, as our tariffs which we had filed with the Civil Aeronautics Board Tariff Bureau had been rejected because of poor reproduction, and I didn't know when the date of acceptance

would be, as we had to remake the entire tariff. He asked me when I thought we would get started on this air express service. I informed him that I didn't know but I would
131 let him know in plenty of time. There were no remarks at all. He called me the latter part of June in my office in Los Angeles, and he was complaining bitterly about a competitor of his in Chicago that had just landed a very large account he was trying to get. He felt very frustrated and wondered how soon we could get this City Messenger Air Express service going on a larger scale, as it seemed very small at present, and he needed the business. He said he needed the business to build up his sales. I informed him that we couldn't do it this fast, that it requires a lot of finances, and we were short of cash, as we had expended a lot of money in legal fees, travel expenses, printing of tariffs, that he would have to be patient, and if he wanted to speed it up, if he knew of someone who could make an investment of cash into the company, it would
132 help considerably. He said he would look around and let me know. That was the end of our conversation. Between the latter part of 1953 and this conversation we had other correspondence from time to time.

He did not participate in the printing of the air bills. I ordered the air bills to be printed myself. I did not place the order directly with the Uarco Company. While I was in New York, between March and April, within the month of March 1954 I was approached by a representative from the Uarco Company who had been referred to me by Mr. Mansfield, and he had heard that we were going to print a lot of air bills. We told him that we had no definite date when they would be printed, but as soon as they were ready to be printed I would let him know, prepare
133 the copy and rush it to him, that he could give us a

delivery date. He said, "Seeing you are a new account, we can give you a twenty day delivery date or deal." I was informed by the Civil Aeronautics Board that barring any unforeseen technical corrections or difficulties the tariffs would be accepted, so I immediately sent this copy to Mr. Mansfield and asked him to rush it to this Carco Company here in Chicago and order 15,000 air bills for me.

Plaintiff's Exhibit 1 is an air bill.

134 My next conversation with Mr. Mansfield was when he called me on the phone about the middle of July sometime and informed me that he was very dissatisfied with the setup he has with our company, as the amount of revenue he was receiving for the delivery and pickup was insufficient for the amount of work he was putting out. I told him at the time, "You won't get rich on pickup and delivery in any business," that if he wanted more he would have to take some active participation in it. He said, "What do you mean?" I told him the only active participation would be to be a part of the corporation, and then he would have the long term capital gains as a part of the corporation group. He said, "What do you want me to do, make an investment in it?" I said, "It is immaterial to me what you do, whether you merge the two businesses or put money into the corporation." He said, "I will tell you what I will do, I will call my brother in Los Angeles and discuss it with him, and I will let you know." That was the end of that conversation. I

135 called Mr. Mansfield sometime in August and asked him what further thought he had given to this proposition, this previous conversation we had, and he suggested, "Why not get in touch with my brother? Maybe I can work something out." So in the first part of September of 1954, I believe, I called Mr. Mansfield's brother, who was an attorney in Los Angeles, and I made an appointment and

I and my attorney called on him in his office. We delved into the possibilities of a merger. No definite commitments were made at this conference. Mr. Mans-
136 field informed me that he would relay the information to his brother and I would hear from him. In the latter part of September or the first week in October, I don't know which, Mr. Mansfield came out to Los Angeles and we picked him up at the air port and brought him into the city. There was no discussions of any kind of business, and that evening he had an appointment to go to some dinner or affair with his brother, and then Mr. Mansfield came into the office the next day and I asked him, "What are you going to do do regarding this consolidation or merger?" He said, "Well, I still haven't talked to my brother yet." I said, "When will you talk to him?" He said, "I will try to talk to him tonight or tomorrow." That was the end of the conversation. The following day Irving Mansfield came into the office and I asked him, "What is your decision?" He started in by deprecating our company, and told me he was not interested in a merger, that all he wanted was to buy a half interest in the City
137 Messenger Air Express. I informed him that no half interest in City Messenger would be sold, because it was part of the City Messenger of Hollywood, Incorporated, and that could be sold. I said, "The only way you can come into this is by way of a merger or investing money." He said, "I am not interested in investing money." It was a peaceful party, and he was still acting as our pick-up agent in Chicago, and I wanted to be on good terms with him.

He started to make these pick-ups and deliveries in the latter part of May, 1954. Right up to the first week in January he picked up and delivered, picking up items and delivering in Chicago, and picking up items in Chicago and shipping to various points, consolidated ship-

ments, breaking bulk that came into Chicago, shipments going to St. Louis, Detroit, Indianapolis,
138 anywhere within a radius of 300 or 400 miles. Neither Mr. Irving Mansfield nor Mrs. Nadine Mansfield nor City Bonded Messenger & Trucking Service ever contributed any moneys toward the cost of applying for a C.A.B. permit. They never advanced five cents. In fact, I never asked them for any money.

I have seen the original of the document which constitutes Plaintiff's Exhibit 7, a letter bearing the Civil Aeronautics Board heading. We received it by registered mail, approximately the 20th of May. That document is a letter of
139 registration, certifying City Messenger of Hollywood, Incorporated, doing business as City Messenger Air Express, as an air freight forwarder. This is the authority by which we are operating the air freight forwarding business.

Plaintiff's Exhibit 7 received in evidence.

Witness continues: City Messenger Air Express at the present time operates from three points, New York, Chicago and Los Angeles in the radial distance covering the entire domestic United States, Hawaii, Alaska, and we have approximately 350 agents who receive our shipments from our shipping points and make delivery to the
140 consignees and also return shipments from these points to other points in the United States. An air freight forwarder is a firm or person who has the authority of the Civil Aeronautics Board to give a true air bill which guarantees the consignor or the public utilizing these services to the point of destination. An air freight forwarder receives shipments from various cities, consolidates them in one group and ships them beyond to an agent in various cities to be forwarded, bulk broken, and shipped beyond by surface carriers over land by truck or rail.

141 I will describe the operation of the City Messenger Air Express from the time that a request is made for delivery of a piece of material in air freight forwarding. A call is received at one of the central offices and where there is a request for a pickup shipment to be transferred, for example, from Los Angeles to Chicago, the driver, we ask the consignor, who is the shipper, what the package contains, or what the freight contains, the approximate weight; we take it to our central terminal and it is consolidated with other shipments. We purchase reserve space from the air lines, which is confirmed ahead of time, and we ship this consolidated shipment to Chicago, whereby our representative, our employee or an agent, if it is not Chicago, opens this bulk shipment and delivers it to the various consignees, getting receipts
142 for the same, which are filed in the central office. We have on file with the Civil Aeronautics Board an all risk policy, insuring the merchandise up to $300,000.00, and we guarantee safe delivery of this item and are backed by this insurance policy. The service rendered by Mr. Mansfield and the City Bonded Messenger & Trucking Service, Incorporated, was in conjunction or in line with this air freight forwarding business. We had an oral agree-
143 ment with Mr. Mansfield, established, and we sent him a copy of an agency agreement but he never signed it and returned it in the latter part of 1954. We had an oral understanding in December, 1953, that if and when our permit would be granted—we didn't know our permit would even be granted—that he would make pickup and delivery for us in the Chicago area. He was to be compensated for this. The sum was not to exceed the charges as made by the Air Cargo, Incorporated, the delivery agent for
144 the various air lines, plus any advances in moneys that he may have to make to surface carriers beyond

Chicago. Irving Mansfield and I were present when we discussed these terms. It was the first week in December, 1953, at his home.

Plaintiff's Exhibit 8, which is an envelope, looks familiar. It wasn't addressed to me. It was addressed
145 to Mr. S. Fullman, probably Sidney.

I saw Mr. Mansfield about the middle of November, at his home in Chicago. Elliott Fullman, Mr. Mansfield and I were present. The discussion was brought up regarding our activity in Chicago. I informed Mr. Mansfield specifically that the only way these two companies can merge is that City Messenger of Hollywood, Incorporated, and City Bonded Messenger Service in Chicago must be absorbed by City Messenger of Hollywood, Incorporated, and that
146 he would receive a stipulated share of the merged companies. He informed my son and me that he did not want to give up any part of the City Bonded Messenger and I informed him, "You can keep on serving us as delivery and pick-up agent and that is all." That ended the conversation. I was in Chicago in January 1955. It must have been between the 10th and the 15th of the month. Mr. Mansfield had written us a letter informing us that he was resigning as delivery agent for City Messenger
147 and Air Express and asked us to make other arrangements. I saw Mr. Mansfield during the time I was in Chicago. I called on him at his office. Sidney Fullman and I were present. Sidney Fullman came to Chicago with me. I believe it was in the forenoon. We saw Mr. Mansfield, but he refused to talk to me. We stood around there for about an hour or so and we finally left. We informed him where we would be at the hotel if he wanted to get in touch with us. I did not see him subsequent to that time. I did not have any conversation
148 with him. I never made an attempt to see him again.

[February 19, 1957]

152 Witness continues: At no time during the conversations that I had with Mr. Mansfield did I ever represent to him that he was to be part owner in the company or in the operation for which I was petitioning the Civil Aeronautics Authority. At no time did I ever ask him for any funds with which to prosecute the petition. At no time did I ever represent to him that he was any more than an agent for the purposes
154 of picking up and delivering here in Chicago. I have seen the documents that constitute Plaintiff's Exhibit, Group Exhibit 9-A and 9-B.

155 Plaintiff's Exhibits 9-A and 9-B received in evidence.

156 Witness continues: I have seen Plaintiff's Exhibit 10 which is a group exhibit stapled together, containing 4 pages in all. It is the articles of incorporation of City Messenger of Hollywood. They were filed in a public office. These are the articles of incorporation under which the City Messenger of Hollywood is now operating.

157 Plaintiff's Exhibit 10 received in evidence.

Witness continues: Neither Mr. Mansfield, Nadine Mansfield nor the defendants corporation ever tend-
158 ered to me any money for the purpose of becoming a
159 part owner in the operation of City Messenger Air Express.

160 *Cross Examination by Mr. Mullin.*

I am an executive with the City Messenger Air Express and City Messenger of Hollywood, Inc. I make minor executive decisions. I have no title. I am not
161 an officer. I am not on the board of directors, but I am an executive. I make minor executive decisions

in Los Angeles when I am there, or in Chicago, or, when I am in New York, and I travel a considerable part of the time, contacting and policing agents of our organization who make pickups and deliveries for us. I travel about six or seven months in the year. By "policing" I mean we check over their records and check their organizations to see if they have the ability and the organization's service.

I am not an auditor. I am not an accountant. I am
162 not a C.P.A. At the time of the institution of this law-
suit in April 19, 1955, my position was the same that I have now. I don't remember the exact date, but I was president up until 1955. I don't remember the exact date but I was replaced by Sidney Fullman sometime in 1955. I believe I was president for about three years before I was replaced by Sidney Fullman. I believe that would bring it back to 1952 when I became president.

Sidney Fullman was president of City Messenger of
163 Hollywood Inc. prior to that time. While I was presi-
dent, Sidney Fullman was vice-president.

Twentieth Century Delivery Service was in Los Angeles prior to that. I was associated with them there. Cannonball was an assumed name for one of their divisions.
164 That was prior to the time that I was connected
with these companies. Prior to their location here in Chicago, Twentieth Century was located in Los Angeles. Twentieth Century Delivery Service was a company that operated delivery service from Santa Barbara to the Mexican border and as far east as San Bernadino and they operated branches in Santa Barbara, San Diego, Long Beach, Riverside, Santa Ana, and Pasadena, and Cannonball Messenger and Delivery was a special delivery service. They operated locally in Los Angeles.

I was vice-president of these companies. I owned stock
165 in these companies. I was not a majority stock-
166 holder. My association with these companies was

terminated by a freeze-out. The United Parcel Service bought a controlling interest in the company and my job was terminated, so there was nothing for me to do except to take money for my stock and leave. Then I came to Chicago, I believe in 1935. I terminated my relationship with Twentieth Century and Cannonball in California in 1934. As to the symbols or trademarks of Cannonball Delivery, they had the word "Cannonball" in script. The letters were large at the beginning, and when it got to the last letter, the "L" they became smaller and showed the script in the form of speed, by lines. I don't remember if what appeared to be a rotating cannonball was at the end of the last letter of the word Cannonball. I have seen Defendants' Exhibit 5, which is an advertising folder with a service mark appearing thereon. I wouldn't know if that was the service mark that Cannonball in California used unless I could compare the two of them. I said I recall it and I tried to describe what I remembered. It looks familiar. If I could compare the two of them I could possibly say they were similar, if they were, but I am not saying they are unless I can compare the two of them. It looks familiar. When I came to Chicago in 1935 I started a messenger and delivery service under the name of Twentieth Century Delivery Service and Cannonball Messenger and Delivery Service. When I terminated my relationship with Cannonball and Twentieth Century in California, I did not receive any assignment of any rights or trademarks, symbols or trade names of the California companies. I had no authority from Twentieth Century Delivery Service in Los Angeles to use their name here in Chicago. I did not have authority from any one other than Twentieth Century. I didn't think the use of those names here in Chicago would be confusing with the names in California. The reason why I didn't

start a business in California under the same names was because I had a yearning to come to Chicago. I wanted to get away from Los Angeles because I was a little frustrated. I was frozen out of this company, and I felt that new places to conquer gave me a stimulus to go ahead. I was president of the Twentieth Century and the Cannonball here in Chicago. I owned stock in these companies. I believe I was a majority stockholder. I severed my connection with Twentieth Century and Cannonball here in Chicago in approximately 1937 by selling the Cannon-
177 ball Messenger Delivery to a man by the name of Rozran. Mr. Mansfield was one-quarter owner, and I was three-quarter owner, and my wife had returned to Los Angeles and didn't want to come to live in Chicago, and it was very rough on me to commute back and forth to Los Angeles every few weeks, so I decided to sell out. I sold this company to Mr. Rozran and
178 gave Mr. Mansfield his one-quarter interest, and returned to California. After I sold my interest I don't believe Mr. Mansfield continued as a one-quarter owner of Cannonball. Part of the deal I had with Mr. Rozran was that Mr. Mansfield was to remain with the Cannonball Company as a salesman, and he agreed to stay there with them. I believe he was there about four or five years. I severed my relationship with Twentieth Century De-
livery by filing a voluntary petition in bankruptcy.
179 They were not one and the same company and they were not related companies. Twentieth Century Delivery Service was a delivery service serving the wholesale and retail stores of Chicago. It was during depression times and we had received a lot of pressure from the unions, and it made operation very difficult, and the result was that the cost of operation was running far beyond our income, so we had to file a petition in bankruptcy to protect the assets we had. There was no relationship between the

two. Each one operated individually. Cannonball Delivery Messenger and Express was a special delivery service with boys on bicycles and men with private cars running
messages for advertising services and such. I don't
180 believe there were any stockholders other than
Mr. Mansfield and I, in either of these companies. There is a possibility my wife may have been a stockholder in Cannonball. But outside of that there were no other stockholders. When the voluntary petition in bankruptcy was filed for the Twentieth Century De-
livery, the trustees in bankruptcy made a careful
181 check of the operations of Cannonball. The only con-
tact I had was with the trustees and they made a thorough check on the thing, and evidently it was proven beyond a doubt that the operation was all right, and they let us continue. I don't believe the Court appointed a custodian for Cannonball. It was operating all the time. I don't remember if Mr. Irving Mansfield was appointed custodian of Cannonball at that time. I hardly believe so. It could be, I may be wrong. It is possible he was ap-
pointed and kept it a secret from me, but I didn't
182 know of it at the time. If the record is there then
183 it is right. The people whom I listed as being as-
sociated with me in my companies are related to me. Beatrice Fullman is my wife; Sidney, Elliott and Norvin Fullman are my sons. Sam Chess is related to my wife. He was an orphan and moved in with us when he was
fourteen years of age.

184 The members of the group that applied to the Civil Aeronautics Board for a letter of registration to operate as an air freight forwarder were Sidney Fullman, Elliott Fullman, Norvin Fullman, Beatrice Fullman, my wife, and I. Sam Chess was not a member of this group. Sam Chess does not have any interest in the company at the present time. He sold his interest to the rest of the group,

185 I believe in 1952. Sam Chess is not engaged in any messenger or related business at the present time. I don't know offhand how much he sold his interest for. I would have to search the records to find that from our auditors. It was one-sixth interest that he sold in City Messenger of Hollywood.

186 The air bills could be described as airway bills, but commonly the description in the trade is "air bills." I recognize Defendants' Exhibit 2. The Ben Fullman which is typed there in the center, "From The Ben Fullman," is I. That was sent to Irving Mansfield, City Messenger of Chicago. Plain-

188 tiff's Exhibit 1 is the bill that is referred to as an air way bill. That letter you are showing me, you are taking things out of context. There are two different descriptions of things in this letter. The first three paragraphs refer to a copy of the City Messenger bill. I had sent Mr. Mansfield some copy and he had written me saying he had a very good buy on books in Chicago and if I cared to order at the same time he did, he could get me a very good price. I was interested. During the interm these bills were being printed. I wrote to him to

189 start with the number 00001, not 01000. That was a typographical error. It should have been 00001. I remember that very distinctly. I remember the airway bills. That airway bill is the one referred to in that letter. I had designed this air bill and copy had been sent to Mr. Mansfield to order them for me, as they had promised delivery in 28 days. That is not the receipt book that was the subject matter of the first part of that let-

190 ter. I just made up copy for the receipts. These are our receipts that we sent him to print. They look like ours. I refer to it as a receipt book, but the only receipts I had sent him to make for us were our copy, and this here

is his own copy, and was not the ones I sent. I sent him copy of covers. I don't know if I have it in my files
191 here. The printing is just the same. Our copy is different on the back from his. We have our own copy. The face is the same, but I believe the back is a little different, the conditions on the back. In the letter I refer to our copy. I wouldn't be referring to Mr. Mansfield's book. Mr. Mansfield did not have these printed for me. He did have some books printed. Our books were printed at Chicago Sales Book Company. He ordered them from there at the same time he ordered his so as
192 to get a better price. The Messenger receipt books are distributed to the company using the service, and when the messenger calls at a place to make a delivery he fills this out. It is generally made in duplicate and he takes the original with him and leaves the duplicate in the book with the customer, and those receipts are returned with the billing date at the end of the month or week or billing period, or sometimes they are kept in the file and just the tape is sent. It is all according to the terms and the systems they use. These are used by the customer
193 to order a messenger to come and pick up something and deliver it for them. I don't know if they are ever used for an order for messenger service in a city other than the city in which the customer is located. The only use we have for them is for local pickup and delivery.
196 Referring to the parties in this lawsuit, a local company which is engaged only in local pickup and delivery would put only his own telephone number on there. There would be a reason for a local company to put the number in other cities. If he had out of town num-
197 bers on the book he would derive benefit. Messenger

198 services are generally referred to on a national scope, and a firm in New York may have offices in Chicago, Detroit, Los Angeles, and they generally ask their branch offices to do business, if possible, with the same firms that are serving them elsewhere. Therefore, a firm like Foote, Cone & Belding, with offices in Los Angeles, New York and Chicago, would much prefer to do business with a company that is already serving them in those cities, so a local person would have a telephone number of Los Angeles on there and would benefit by that because they possibly notify these people that they have offices af-
199 filiated with a firm in another city. We just answer the phone "City Messenger." City Messenger of
200 Hollywood would answer the phone in Los Angeles. We would answer the phone if Foote, Cone & Belding called in New York for that service. The City Bonded Messenger & Trucking Service wouldn't derive any benefit or revenue from any of those calls that were placed in other cities.

201 Defendants' Exhibit 2 received in evidence.

Witness continues: Defendants' Exhibit 2 is signed "Ben" which is I. It is addressed to "Irving
202 Mansfield," who testified here yesterday. He sent me a note. I believe we have it in our exhibits there, something about 60 days, not responsible, or something like that, and I told him I didn't believe that would be legal. He sent me a form of terms and conditions on which pickups and deliveries are made, for putting on the back of all receipts, and criticized it.
203 I advised him "You will note that on our conditions, first paragraph, that the loss limit is set at $50.00
204 unless a higher value is set or declared by the customer on the front of the ticket at the time the shipment is tendered to the driver for delivery. In case a higher limit

is set then an extra charge is made for the excess valuation. The terms for C.O.D.'s poorly wrapped are about the same." I told him that these limitations wouldn't stand up in court, and then I said "Enclosed you will find examples of the terms and conditions that we accept ship-
205 ments." I sent him a form of ours. I said "The number on the Air Way Bill is not the registration number, but the place that I want each bill numbered beginning '01000' and up." What I really intended to say was "00001." That is the way they came. I said, "Have them rush proofs to you, and send them on to me."
206 I meant exactly what I said. He was ordering some receipts for me, and I wanted to be sure that they were correct because the Public Utilities law in California is a little different than it is here.

I can identify Defendants' Exhibit 7. It is a photostatic copy of a letter which I furnished to you for photostating and I note that this "terms and conditions"
207 has been attached over part of the date. It just shows the year 1954. I believe it was written subsequent to the letter of May 13, 1954, to Irving Mansfield. The date on the original letter shows May 11th and the
208 date of the answer is May 13th. I recognize the handwriting. It looks like Mr. Mansfield's handwriting. It is addressed "Dear Ben," and concludes with "Yours, Irving."

Defendants' Exhibit 7 received in evidence.

211 Witness continues: I testified concerning some receipt books. The receipt books are also referred to as ticket books. I can identify Defendants' Exhibit 8, a letter dated May 1, 1954. The signature "Ben Full-
212 man" is mine. The Irving Mansfield to whom the letter is addressed is one of the defendants in this case. The first sentence of the second paragraph has no relationship to the order book or ticket book or receipt

book. The paragraph appearing on page 2 of the letter under the heading "ticket books" is related to the book I asked him to order for us.

Defendants' Exhibits 6 and 8 received in evidence.

Witness continues: I did not prior to May 18, 1955 or '54 discuss with Mr. Mansfield his entering into the business with me and the formation of a corporation or some entity to handle the air freight forwarding business. I sent the telegram which constitutes Defendants' Exhibit 9. It was addressed to Irving Mansfield, City Bonded Messenger. There is a difference between the telegram and the letter because when we write telegrams we economize and use only the words that are necessary to create a certain thought to the recipient. It wasn't a matter of occurring to me to use City Messenger of Hollywood, Inc. rather than City Messenger Air Express. It was just economy in writing a telegram.

Defendants' Exhibit 9 received in evidence.

Witness continues: Referring to the period from May, 1954 to January, 1955, a period during which the defendants were associated with us, the main office of City Messenger of Hollywood, Inc. doing business as City Messenger Air Express was located at 1414 Cole Place, Hollywood, California. The books and records of the business were kept there. The agents, as a rule, bill the nearest office from where the shipment originates. If the shipment originated in Chicago they would send the receipt to Chicago; if it originated in New York, they would send the receipt to New York; if it originated in Los Angeles, the receipts were sent to Los Angeles and they, in turn, were instructed to forward them to the central office in Los Angeles for payment. I was referring to bills, invoices, receipts and air bills. When I say "air bills," I

mean if the item was re-forwarded over another air line from that station. We bill customers who call up our New York office for service from New York. The anditing copy is sent to the main office for bookkeeping records. The billing in New York is done for both the Messenger and for the Air Express. It is done for both companies, City Messenger in New York and City Messenger Air Ex-
press. The Chicago billing is done from 845 South
222 Wabash Avenue. From May, 1954, to January, 1955, we did not have an office at that time, so the billing was done in Los Angeles. We applied for our CAB license in the latter part of 1953 or the early part of
223 1954, either of those times. At that time our corporation had an office in New York. We had an office and terminal in New York and we had an office and terminal in Los Angeles. We owned some trucks and vehicles. I don't know offhand what trucks and vehicles we had. I would have to go and check my records. I don't remember how many we had but I do remember that we had
224 some. We had an office and terminal in Los Angeles. The terminal is located at 1414 Cole Place. A terminal is a place where freight is received and dispatched. Trucks or other vehicles are not maintained at the terminals. We did not have any garage or facilities for maintaining trucks. Our office and terminal in New York was at 203 East 36th Street. We had a receiving
225 office at 727 West 7th Street in Los Angeles, California. A receiving office is where messengers receive and pick up packages and deliver them or leave them there to
226 be transferred to another messenger or driver. We just had a receiving point. Our offices were located at 1414 Cole Place. A receiving point was a place where the messengers left their packages and picked up packages. A telephone operator was in attendance. It was not an

office. Our offices were at 1414 Cole Place. 300 South Beverly Drive, Beverly Hills, California, was also a receiving point and a telephone station for our men. It was not an office. We had no office in the Rockefeller
227 Plaza in New York. In 1954 we had no leases. We were on a month to month tenancy in 1954. We did have a telephone receiving station in Rockefeller Plaza. The New York telephone company has facilities there for people like us. They have all kinds of phone booths and they have four or five telephone operators who receive messages for you and you can utilize their facilities.
228 We did have a lease for our office at 1414 Cole Place. We had in Times Square a telephone receiving station on the same order that we had at Rockefeller Plaza; the same in Columbus Circle; the same at Grand Central; and the same at Battery and Wall Street. The facilities
229 in those places are given free, and we pay for all the
231 outgoing calls. Anyone is at liberty to use them. It is not a pay phone. Anyone can use its telephone facilities. They have telephone operators there with a series of telephones, and you pay your money at a desk, you go to the operator and tell her what number you want, give her the number, and she gets the number and gives you one of the booths to use. They also receive messages there.
232 Anyone can use them, the public, or anybody. Prior to March, 1954, City Messenger of Hollywood, Inc., or City Messenger of Hollywood, Inc., doing business as City Messenger Air Express, had no office in Chicago. I don't believe we had a telephone listing here. We had no pickups or deliveries here. We did not make any pickups or deliveries, have telephone listings or maintain an office
233 in the Chicago area including neighboring cities in the State of Indiana. We have done it since March, 1954. We opened up an office in January, 1955 in Chicago. We

did not have an office in Chicago or within 500 miles
234 of Chicago prior to that time. We picked up in In-
dianapolis and we had agents within 500 miles. City
235 Messenger Air Express or City Messenger of Holly-
wood, Inc., doing business as City Messenger Air Ex-
press, has made pickups and deliveries of air express since
1954. We started doing that in January, 1955. Prior to
that City Bonded Messenger made the pickups and de-
liveries for us. City Bonded Messenger is the defend-
236 ant. I can't answer whether we have made any pick-
ups or deliveries for anything other than Air Express
since March, 1954, because I am not located in this office.
I just come here on visits. Whoever was in charge at the
time would have that information. We had three managers
here. The first manager was a fellow by the name of
237 Brunhardt. I think they called him Bill, Bill Brun-
hardt. I don't know if he is available. He is not
connected with us any longer. He had become quite frus-
trated with the whole thing, and he quit. The next man-
ager was Harry Shane. He had the same frustrations and
quit. The last person there is my son, Norvin Fullman.
He is running the office at present. I hardly believe any
of the principals of the corporation would know about these
pickups other than these managers, unless there was some-
thing outstanding on the item, that they would bother some-
one from New York or Los Angeles as to what is going
on here, because it was all routine matters unless they
238 wrote about it. Norvin would be the only one. He
is the manager now. I don't know the dates of the
employment of these managers. I don't remember the
time when Brunhardt quit. Norvin, I believe, has been
here since the 1st of August. No, I believe it was later
than that; the 1st of October, maybe. Sidney could answer
that. I don't keep a tab of the movements. We have some
written contracts and some oral agreements with the 350

exclusive agents throughout the country, Alaska and
239 Hawaii. An agent's duty is to receive freight. He is alerted when freight comes in, and he picks it up at the airport and delivers it if it is in his destination city, or if an agent is a transshipper or at a transshipping point like Los Angeles or Chicago, Dallas or San Francisco, he transships it to a point fed by a feeder line to another one of our agents. In the same way they originate ship-
ments in the first places and ship them back to the
240 center points or the main cities like Chicago, San Francisco or New York. There is an expenditure required by these exclusive agents in order to serve us. They make advances sometimes to surface carriers going beyond their point. For example, a shipment would come in going to a place like West Point, New York, so if it is to this place in New York he would put it aboard a bus after he took it from the air port, and would pay the bus company advances for the charges, prepay it to that point, and then he would bill for the charges and services he rendered. There are many cities in the United States, Alaska and Hawaii where we do not have exclusive agents. When we have a shipment to such a point, we transship it. We notify the consignee to come and pick it up at the air port where it is left for him, or at the railroad station or the bus depot. We furnish these agents with the necessary printed forms
and materials necessary for them to operate as our
241 exclusive agents. These exclusive agents probably print up or order or expend moneys on printed materials other than those we furnish them. These agents are also local draymen or trucking companies in these communities, and they have their own business, and probably from time to time they print stuff of their own, advertising that they are agents for City Messenger Air Express, which enriches their standing in the community and also en-

riches their revenue by getting shipments originating in their cities.

We do not have any telephone listing of City Messenger of Hollywood, Inc. other than in Los Angeles and New York and Chicago. There are quite a few other companies who are engaged in the air freight forwarding
242 business. Some of them do handle air shipments for other companies. I believe that some of those who are included in the 350 exclusive agents do that. I have asked some of my exclusive agents to order or prepare printed forms for me. I can name one or two of them—the Triple A Distributing Company in St. Louis; Wings and Wheels Service Company in Dallas, Texas; Aero Messenger and Delivery in San Francisco. They printed up some advertising forms that they use as stuffers in their community. They did not print any air bills, any mes-
243 senger books, any ticket books, or anything connected with the actual operation of my company, outside of the advertising fliers. None of these 350 exclusive agents at any time guaranteed my credit with air lines, Western Union, Air Express or any other service with whom
245 I had business. I never saw the letter that constitutes Defendants' Exhibit 10, signed by C. H. Kuehne, credit manager of United Air Lines, addressed to City Bonded Messenger & Trucking Service, neither did I authorize a reply of it. I very distinctly recall making a telephone call from Los Angeles to Irving Mansfield on August
246 23, 1954. I can't tell you what the telephone call was unless I have a chance to preface what caused the telephone call. Mr. Strynmeyer, I believe, sales manager of the United Air Lines in Los Angeles, called our office and told us, "There is some difficulty with your account in Chicago where the main office of United Air Lines is. There are charges coming through there on the City Bonded Messen-

ger and the City Messenger Air Express and they don't know which is which, and, as your account is growing, we want to cut off your credit temporarily until such time as you can contact Mr. Kuehne and straighten this matter out." He said, "Will you call him?" I said, "No; better than that, I will call my agent in Chicago and have him call on it." So, I called Mr. Mansfield and asked him to call on Mr. Kuehne at United Air Lines, explaining to him what had happened and straighten him out with what information he could, if he could do it and, if not, to phone me. Mr. Mansfield called on Mr. Kuehne and straightened out
247 the matter. I did not authorize Mr. Mansfield to make any commitments for the City Messenger Air Express without notifying me first. Mr. Mansfield called me back the next day and stated, "I got you all fixed up. I am personally writing a guarantee." I said, "You didn't have to do that, we have credit." He said, "Well, it is all straightened out. Forget about it." Our credit was cut off for one day before I called Mr. Mansfield. Mr. Mansfield acted immediately and the next day our credit was reinstated. I called him as a friend to call up there and see Mr. Kuehne and what it was, because they had City Bonded Messenger of Chicago and City Messenger Air Express mixed up.

248 *Redirect Examination by Mr. Cohen.*

The precise name of one of the companies in Chicago which I was operating in the '30's was Twentieth Century Parcel Service. The name of the company in Los Angeles was entitled "Twentieth Century Delivery Service." When I had occasion to form Twentieth Century Parcel Service in Chicago in the '30's I did make a check to determine whether or not I had the right to use such name in the State of Illinois and in the City of Chicago. The checks were negative. There was no one operating a

249 delivery service. My attorney made a check of all the records in the county and said that those names were clear and that I could use them. Prior to the time that I formed the corporation known as Cannonball Bonded Messenger Service, Incorporated, in Chicago, Illinois, I made an effort to determine whether or not I could use that name in Illinois. I had my attorney make a check of all the special delivery services here in the city and he notified me that there was no one operating a special delivery service under that name and I told him to go ahead with that name
250 and use it.

I have known Irving Mansfield since 1935 and we have been good friends since that time up until January, 1955.

I can identify Plaintiff's Exhibit 11. That is a copy
251 of a book that we use in Los Angeles and New York, a messenger book. That is one of the books. I don't know the exact date that book was printed, but that is the book we have been using the last two or three years. Defendants' Exhibit 6 and Plaintiff's Exhibit 11 are not identical. They are different. Ours is different from the one that they have. The only similarity is that they have the boy with the "City Bonded" on there in reverse color. That is the only similarity of the thing. The inside material is not identical. On the book City Messenger of Holly-
252 wood, we have, in the upper left-hand corner, "New York, Chicago, Los Angeles, Hollywood," and "Beverly Hills," and the City Messenger of Chicago on the front, on their book, in the upper left-hand corner is "Main Office, Randolph 6-6001. Truck Terminal, Michigan 2-6500." The next two lines are similar. Under that, where we describe our services, "Rush Special, regular, deferred, route," they have "rush special, expedite deferred weight." The next line, "Waiting time," "O.K.'ed by" is similar. Down at the next, where it says, "Pick-up from," it is similar to ours. The "address" is similar

to ours. "Delivered to" is similar to ours. "Address" is similar to ours. "Received by" is similar to ours. City Bonded Messenger has special instructions down at the bottom. We don't have that. We have the special instructions made up in a box. The copy sheets contained in these books and the terms and conditions on the reverse side of the copy sheets are a little bit different. I can't read the print, it is too small, but, from the paragraphs and the way they are printed, there must be some different wordings in there. The paragraph on page 2 of Defendants' Exhibit 8 refers to Plaintiff's Exhibit 11. We printed one thousand books for New York and one thousand books for Los Angeles. Plaintiff's Exhibit 11 is used in the regular course of business of City Messenger of Hollywood.

Plaintiff's Exhibit 11 received in evidence.

Witness continues: I have never asked any of my agents to guarantee credit for me at any time, in relation to the operation of City Messenger Air Express. I did not ask Mr. Mansfield and the defendant corporation, City Bonded Messenger & Trucking Service, Incorporated, to guarantee credit with any person, firm or corporation during the period from May, 1954, to the second week of January, 1955. In the course of the business operations of City Messenger Air Express, I or someone else in the plaintiff corporation have had occasion to call an agent to clear up local difficulties. Sometimes we send a shipment out prepaid and, through an inadvertent error on the part of the clerk, or the air lines' office, it is not marked "prepaid," and it arrives "collect," and the agent would phone us and say, "This item came collect; do you want me to pay for it or do you want to clear it up?" I would clear it up. Or, the agent would call me and say, "We have too many shipments by

carriers and we don't feel we want to advance this money. Will you please open up a charge account under the name of your own company?" They would get the information as to who the credit manager was, and so forth, and, either one of the members of our company would make a trip down there, or, we would clear it up by telephone. As a rule, it is cleared by telephone. We would ask our agents, from time to time, to insert advertisements in the yellow book and to pay for it and we give them back the money. From time to time we call them and try to enforce collection on unpaid shipments that came into their community "collect" and were inadvertently left uncollected after the bill was sent and the customer was slow in paying.

I am not the person most familiar with the operation of our office in New York City or in the New York
257 community. Elliott Fullman would be that person. I don't concern myself too much with local geographical conditions and the member of the firm in charge of that district expedites the easiest way of operations. Naturally, visiting there from time to time, I would question it
258 and get enlightened as to what was going on. I did not authorize City Bonded Messenger & Trucking Service to affix the telephone numbers listed for New York and Los Angeles on the cover of Defendants' Exhibit 6. No one that I know of in City Messenger of Hollywood authorized the defendant corporation.

Recross Examination by Mr. Mullin.

261 Referring to Plaintiff's Exhibit 11, there is no Chicago number appearing on it. There is a Chicago number appearing on Defendants' Exhibit 6.

The first paragraph of the letter of May 1st reads
262 as follows:

"The enclosed copy for the 3 part snap-out forms shows slight changes from our present layout. You

will note that the righthand side has a place for authorizations by the shipper or customer where item is picked up. This is an important feature, as the signature of the sender in the appropriate place will speed payment of many questionable charges such as for instance those where a customer requests pickup at a location other than their own plant and then delivery to a third location and a third party. The upper righthand corner has a place and space allocated for an account number or identification, also an aid in customer identification, such as where customers have similar names, large firms where different departments are using you but are billed separately, out of town charges such as may occur on instruction for pickup on City Mesesnger Air Express, and other varied situations."

263 "You will note that the phone numbers of each city appear. If you wish an additional phone to appear on your Chicago forms you may insert if space permits."

264 I did not authorize anything. I was telling him about the copy here, and if he wanted to make something similar to ours he could. He was using that in Chicago. They were not my forms; they were his forms. I don't know what he was going to order for himself.

265 I didn't see his copies. We made a check before we opened up our office and came in here under the City Messenger of Hollywood doing business as City Messenger Air Express. Mr. Mansfield was using the name "City Messenger Company." He had come to Los Angeles in the early part of the war and visited my establishment called "City Messenger." That must have been prior to the time he opened up, and then he returned to Chicago. Mr. Mansfield was operating the City Messenger. I knew

266 that. It was City Bonded Messenger. Mr. Mansfield knew also that we were opening up on the City Messenger Air Express.

Plaintiff's Exhibit 12, which purports to be a tele-
267 phone order in triplicate, looks like the ones we use.
City Messenger of Hollywood developed that form. It was printed to City Messenger of Hollywood's specifications. City Messenger of Hollywood is using that form at the present time, in the operation of City Messenger service in Los Angeles and City Messenger service in New York. It would be used only where the messenger was giving an order to pick up City Messenger Air Express shipments. This involves a telephone order form.

268 Plaintiff's Exhibit 12 received in evidence.

Witness continues: Some of the telephone order forms which constitute Plaintiff's Exhibit 12 were printed in 1954. We also had the forms before 1954. That specific form was printed in 1954 while we were operating City
269 Mesenger Air Express.

Recross Examination by Mr. Mullin.

Those are not pickup tickets, they are telephone order forms. As the order comes over the telephone the telephone operator writes those out and hands them to a dispatcher, the white copy going to the messenger, the yellow copy going on the dispatcher board, and the pink copy is used in case something happens to the other two. It is
270 only used as a pickup form in the Messenger pickup service. We were not engaged in messenger service here in Chicago in 1948.

271 *Redirect Examination by Mr. Cohen.*

273 City Bonded Mesenger Service used the order blanks in 1954. We drew up those forms because it would expedite the handling of City Messenger Air Express shipments. We used them in Chicago. We suggested that for use in Chicago to Mr. Mansfield. Mr. Mansfield used it. He used it from the time he began serving City Messenger

Air Express until he was supposed to quit using them in 1955. Whether he still uses them, I don't know. When I say I used them I mean Mr. Mansfield used them. Mr. Mans-
field did use the forms in the operation of City Mes-
274 senger Air Express business. That is just a pickup order. Air Express had nothing to do with that. If he picked up an air express shipment there was an Air Express bill that went with it. Each one of the shippers had copies of our air bills.

276 SIDNEY B. FULLMAN, called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Cohen.

277 My name is Sidney B. Fullman. I am 35 years old. I reside at 1258 North Sweetzer, Los Angeles, California. I hold a position with the plaintiff company. I am at present president of City Messenger of Hollywood. I hold a stock interest in that company. I have been associated with the predecessor company of Fullman and Chess since 1947, and with City Messenger of Holly-
278 wood since its inception in 1951. I have seen the instrument which constitutes Plaintiff's Exhibit 13. I first saw it on or about October 1, 1947. This particular document was mailed to me by the Valley Times. The Valley Times is a public newspaper and is published in Los Angeles County, Los Angeles, California. It is
279 a daily newspaper of general circulation. I caused the ad which is affixed thereto to be published in the newspaper. It represents the things and purposes for which it was published. This exhibit has been, since October of 1947, in my personal envelope in the files of City Messenger of Hollywood. We operated

a business under the name of City Messenger of Hollywood. It was a pickup and delivery or package service and special delivery service. We operated that business in Los Angeles, California. At the time of that instrument it was a partnership. My partner was Samuel Chess.

282 I was employed by the City Messenger of Hollywood, a California corporation, from February, 1951 and I am still employed there. Prior to the formation of the plaintiff corporation I operated the messenger business in partnership with Mr. Chess. The name of that business

283 was City Messenger of Hollywood. Its offices were located at 6512 Selma Avenue, Hollywood, California. It was originated on or about April the 29th, I believe, 1947. That business continued until February 19, 1951. On that day City Messenger decided to take the assets of City

284 Messenger of Hollywood and incorporate the company into a new corporation. This was done. The successor to the business of Samuel Chess and Sidney Fullman, doing business as City Messenger of Hollywood, is the plaintiff corporation. We were doing business on Monday, June 9, 1947. I caused advertisements to be published in the

285 newspapers in that community. I have seen Plaintiff's Exhibit 14 previous to today. I first saw it about three or four days prior to the appearance of this ad in the paper. I saw the paper on June 9, 1947. That is an actual sheet from a paper published on that day by that newspaper. The name of the newspaper is Los Angeles Herald and Express. The ad appeared in the newspaper on the

286 day that this document bears. This paper has been in my personal files at City Messenger of Hollywood since Monday, June 9, 1947.

287 Plaintiff's Exhibit 14 received in evidence.

Witness continues: After returning from the war on February 22, 1946, I went to work for Modern Delivery

Service in the Hollywood office as the co-manager because Mr. Sam Chess was already operating as the manager of the office. He and I operated as co-managers of the office until approximately April the 29th of 1947, when we purchased a customer list from Modern Delivery Service and the right to use the name City Messenger and its identification and marks in the area, in the Hollywood area, and in such areas where it would not compete with Modern
Delivery Service's downtown operation. They retained
289 the right to use the name in the downtown operation.
The consideration for this was $2,547.00. We paid it off in installments. Originally we had a year to pay, but we paid it off a little before that and I think it took us about seven months in installments. This money was paid to Modern Delivery Service.

I have Plaintiff's Exhibit 15. I first saw this some-
290 time in January, 1948. I caused this document to be
prepared. It is not the original. This is the copy that was in my files. The original is on file with the United States Government. That is a true and correct carbon copy. It is the only copy we retained. On line 21 it shows that $4,832.46 were the total taxable wages paid during a
particular quarter. That money was actually paid.
291 It was paid by Sidney Fullman and Sam Chess from
the account in the Hollywood State Bank. It was paid to the people listed on that sheet in the amount there indicated for the quarter ending December 31, 1947. In reference to Plaintiff's Exhibit 15, the heading on these particular forms is normally prepared by the governmental agency. It is already prepared so that the number on the
bottom will be correct. They have this number and
292 they want to make sure that their files are correct, so
they prepare this information themselves, the heading on the form, so their accounts won't become confused.

That instrument came to me with that typing on it. The rest of it was typed at my direction.

Plaintiff's Exhibit 15 received in evidence.

[February 20, 1957]

295 Witness continues: I testified that Mr. Chess and I paid $2,547.00 to Modern Delivery Service for the name City Messenger Service and other assets. An agreement between our corporation and the Modern Delivery Service existed. The date of that agreement is on or about April the 29th of 1947. I did on or about that day
296 actually receive the assets for which I paid the money. This bill of sale actually existed in the corporate records. I don't know where those corporate records of the bill of sale or a copy of the corporate sale or agreement is. Plaintiff's Exhibit 3 is the agreement that I received from Modern Delivery Service from Miss Culhuin, the secretary of the corporation. I signed the original of this
297 the previous day. The original is in the records of the Modern Delivery Service. I don't know where those records are. I have made an effort to find the records of Modern Delivery Service. I haven't found them. I saw the original agreement that was
298 executed by the corporation. This instrument does not differ in any way from the original document. It
299 contains all the signatures of the parties involved in this particular instrument. The original document contained the actual signature of Ben Fullman, President. The signature of Elliott Fullman, Vice-President, actually appeared on the original document. After the execution of that document, Sam Chess and I took over the office at 6512 Selma Avenue in Hollywood, California. We op-
300 erated under the trade name of City Messenger of Hollywood. We started operating the following day, April the 30th. That was the date of this instrument. This

instrument came into my possession the day after the agreement to sell. I remembered that we had forgotten to obtain a copy of the sales agreement and I went down to the office of Modern Delivery Service myself with Sam Chess and we asked Miss Cullum, who was the secretary, to prepare a copy of the sales agreements. The signatures of Ben Fullman and Elliott Fullman do not appear because they weren't there when Miss Cullum typed up this instrument. I didn't think it was necessary for me to go to them subsequent to that time and ask them
301 to affix their signatures, because it was my brother and my father. I knew that they would agree to the instrument. We operated City Messenger in Hollywood until February 19th of 1951. During that period
302 of time we used the word in script "City" with a boy, a cartoon character running through the scene, which we used continuously during that time.

303 I testified that the City Messenger of Hollywood was a successor to the copartnership of Samuel Chess and Sidney Fullman doing business as City Messenger of Hollywood. At the time of the incorporation of the plaintiff in this cause, in exchange for 100 shares of stock each,
304 Samuel Chess and I sold the interest in our assets, or the remaining assets after our obligations had been paid off, and in exchange for the remaining assets we received 100 shares of stock in the City Messenger of Hollywood. Trademarks, symbols, names and the like which belonged to the copartnership were trans-
305 ferred to the corporation. The symbol of the word "City" with the messenger boy running through the letter "C" which appears on Plaintiff's Exhibit 6, constituted an asset sold to the plaintiff corporation. Immediately after the copartnership transferred that sym-
312 bol the corporation began using that symbol. Our
313 corporation did use other symbols subsequent to the

time it was incorporated. The plaintiff corporation used the script "C-i-t-y" with the boy running through it. The plaintiff corporation did not use any other symbol that I can recall. The plaintiff corporation has
314 been using the symbol continuously since February 19, 1951. In the year 1951 the plaintiff corporation used that symbol all over the country. That included Los Angeles, New York, Chicago, and wherever this Bagatelle Magazine was distributed, and I understand it was in the 48 states. In 1952 the plaintiff corporation used that symbol all over the country. The plaintiff corporation was using the same symbol all over the
315 country during the years 1954, 1955, 1956 and 1957. The first use of that symbol in the State of Illinois was on or about October, 1951. Prior to 1954, the plaintiff corporation solicited business in the State of Illinois. In our Diners' Club promotion, in 1951, we solicited business in the Chicago area from persons who had residences
316 or businesses in the Chicago area who would use our service for particular transactions that could be performed in the Los Angeles area. In other words, if a person had some baggage coming out to Los Angeles from Chicago, we could pick that up at the station and deliver it to the hotel. We solicited business from advertising agencies which had offices in Chicago, who had traveling account executives coming to Los Angeles and would require messenger service from their hotel rooms or from residences where they were staying and who did not, possibly, have established credit in the local Los Angeles area. We could perform this service for them in Los Angeles on a credit basis.

317 During the years 1951, 1952 and 1953, the plaintiff corporation did have occasion to send mail into the Illinois community. The mail contained the symbol of our company. Some of this advertising material bearing the

symbol of the plaintiff corporation was directed to Irving Mansfield or City Bonded Messenger & Trucking Service. On or about the second week in July, I directed a communication to Irving Mansfield outlining a conversation that I had had with Mr. Al Bloomingdale, president of the Diners' Club. This conversation was that Mr. Bloom-
318 ingdale was interested in enlisting a messenger service or messenger services in the Diners' Club booklet, which was their credit card booklet, and to advertise in their magazine, the Bagatelle, the fact that the Diners' Club could receive national messenger service. I asked him if he was interested in being listed on the card and in the magazine. I informed him also that I was writing a similar letter to Mr. Anthony Roper of Mercury Messenger Service, inquiring if he was interested and that if he was he should reply to me or to my father and they could get together at some place mutually agreed upon to discuss the details. This letter was on the
319 letterhead of the plaintiff corporation. This was in
320 1951, on or about the second week in July. Plaintiff's Exhibit 16 is a carbon copy of the letter that was sent.
321 However, it bears the signature of my father, Ben Fullman. I typed this letter. I recall that I asked
324 him to sign it because I didn't know Mr. Mansfield
325 that well. On or about May, 1954, I caused to have sent to Mr. Mansfield certain forms to be printed in the Chicago area, bearing our symbol and mark and also sent some correspondence relating to City Messenger Air Express operations in the area and the contemplated operations in the Chicago area. I had conversations with Mr. Mansfield or a representative of the defendant corporation during the period of time he was rendering service for our company.

330 City Messenger of Hollywood is operating under the authority contained in a copy of a letter from the

Civil Aeronautics Board which constitutes Plaintiff's Exhibit 7. By reason of that permit the plaintiff corporation is conducting air freight forwarding service. We first started rendering that service on the effective date of our tariff, May 22, 1954. City Messenger Air Express, the assumed name under which the corporation is operating, is an air freight forwarding service. We act as an intermediary for a shipper in the performance of express, air express and air freight service in the United States and
in the territories. Our operations consist of picking
331 up packages at shippers' doors, consolidating such
shipments in our terminals, carrying such consolidated shipments to the air ports, availing the shipper and ourselves of the most economical and efficient form of air carriage to a forwarding city, expediting the shipment while en route, maintaining the full responsibility for the shipment from the consignor's door to the consignee's door. As a consequence, we maintain complete insurance coverage, protecting the shipper and ourselves against damage to the shipments en route. City Messenger of Hollywood, doing business as City Messenger Air Express, does not conduct a local delivery and pickup service
in any community. With reference to pickup and
332 delivery in the Chicago community, it will perform
pickup and delivery, but it must be in connection with a forwarding movement.

I was in Chicago in January, 1955. I had conversations with the members of the defendant corporation, specifically Irving Mansfield. It was on or about January the 4th or 5th. It was a Monday. I had arrived in Chicago by air as a consequence of a letter from Mr. Mansfield to Mr. Fullman that he wished to terminate his agency ar-
rangement with City Messenger Air Express. There
333 were actually a number of meetings. At the first

meeting he came to the air port and picked me up in his car and brought me into his office. En route, we had some conversations. These conversations related to City Messenger Air Express operation. Mr. Mansfield first said, "What's the matter with you fellows? Why don't you pay that money you owe me?" My reply was, "Irving, I think we do owe you some money. How much do we owe?" He said, "You
334 owe me plenty." I said, "How much, specifically? You never rendered me any bills." He said, "You owe me better than $1500." I said, "That is a lot of money." He said, "Well, you can come into the office and you will find out about it." I said, "That is all right." We
335 did go to the office. The office was located at 193 North LaSalle Street. It is a store, in my estimation a relatively small store. There is a ground floor, where they conduct their operations. It is partitioned off. There is a partition in front, sort of a railing partition behind which a dispatcher performs his operations. There is a partition behind which is conducted some type of bookkeeping operation. There are telephones in two different points in the office. They have what is known as a turret board for the dispatchers, with many trunk lines and some other types of telephone lines terminating in that box. Upstairs, on a small balcony there is a small space for one desk and on this is also a telephone. The telephone under the number Randolph 6-2931 was
336 located on the balcony where the desk was located. The telephone rang in my presence. There was a woman upstairs who answered the telephone. She answered it "City Bonded." That is the telephone number that was appearing in the Red Book during the year 1954 as City Messenger Air Express. It was the telephone that I had requested Mr. Mansfield and City Bonded Messenger
337 & Trucking to secure for me. On the 19th day of

January. I contacted the Illinois Bell Telephone Company. I spoke to the manager of the business office.
338 The purpose of the conversation was to remove the telephone, Randolph 6-2931, from 193 North LaSalle Street, and to hold it for me and my City Messenger Air Express until we could find a permanent location in Chicago. We had already terminated our association with City Bonded. The reaction of the Illinois Bell Telephone Company was "I will check the records." They did check the records. They called Mr. Mansfield in my presence and asked him if they should remove this Randolph 6-2931
339 number from his office at 193 North LaSalle Street. The telephone company said that Mr. Mansfield was the one who applied for this number. I said, "No, it is City Messenger Air Express." They did not permit me to remove that telephone number. The reason they gave me was that the responsible party was Irving Mansfield and this phone had been applied for by Irving Mansfield under the name "City Messenger Air Express" and so far as they knew that was the City Messenger Air Express, or it was Irving Mansfield, and I replied, "I can show you our permit from the Civil Aeronautics Board for we are the City Messenger of Hollywood doing
340 business as the City Messenger Air Express." I did show it to them at that meeting. The manager of the Illinois Bell Telephone Company said, "I really have no authority to remove that telephone from there even though you prove to me you have the right to use the name City Messenger Air Express by the Civil Aeronautics Board. Irving Mansfield is still the party who applied for this telephone and as far as we are concerned, it is his telephone." We have never been able to secure the removal of that telephone. We got a telephone num-
341 ber. They said they could only give us an unlisted telephone number. We got an unlisted number one

month after on or about February 19, 1955. We didn't have the telephone in the name of City Messenger of Hollywood doing business as City Messenger Air Express during the period of time from January 19, 1955 to February 19, 1955. We had no service whatsoever from the Illinois Bell Telephone Company. On the 19th of February we had services under an unlisted telephone number. We never secured a telephone number with a listing from the Telephone Company under the name City Messenger Air Express. We secured a listing under the name CMAX Air Freight, in December, 1955 Classified Directory. We never had services as a listed number between the
342 19th of February, 1955 and December of 1955.

I never made any representations to Mr. Mansfield
343 that he would join with City Messenger of Hollywood in the ownership of the air freight forwarding business known as City Messenger Air Express. I had conversations with Mr. Mansfield relating to ownership or participation in that business on July 4, 1954, at Mr. Mansfield's home at 5210 Blackstone Avenue, in Chicago. Mr. Elliott Fullman, Irving Mansfield and I were present. The meeting was a series of conferences between Mr. Mansfield, El-
liott Fullman and myself. The first conversation at
344 this meeting took place at approximately 1:00 o'clock.

I said to Mr. Mansfield "I understand that you have been talking with Elliott Fullman about making more money out of this City Messenger Air Express operation in the Chicago area." His reply was, "I have got to make more money, as there is too much work connected with this operation to make anything on pickup and delivery." I said, "Under the present arrangement, under the present agency arrangement that we have, that is all you can participate in financially, is the pickup and delivery. To participate to a greater degree you would have to make

some type of investment in City Messenger of Hollywood." He responded, "I have talked to Elliott about
345 this. However, I am not interested in investing in City Messenger of Hollywood; I am only interested in investing in City Messenger Air Express." I replied, "That is impossible, because City Messenger Air Express is just an assumed name for City Messenger of Hollywood. The permits, the air freight forwarding permits are issued to City Messenger of Hollywood, and are not transferable. If arrangements relative to investment in City Messenger Air Express were contemplated, it would actually entail the necessity of filing for a new permit, which I don't think we could get, under City Messenger Air Express." There were no concrete offers made of any moneys for participation in the operation known as City Messenger Air Express on the part of the de-
346 fendant Irving Mansfield. I definitely did not tell him at any time that he was to be part owner of such air freight forwarding business. The type of operation that we had May, 1954, is the same as the operation today.

347 I have seen Plaintiff's Exhibit 17. I saw it the first time at the home of Miss Rose Siegal on or about February 1, 1955. The exhibit which purports to be a filler and on its frontpiece has "City Bonded Messenger & Trucking Service" was being distributed in the City of Chicago during the year 1955. The first time it was distributed was in March of 1955. I received or I obtained a copy of that which came through the mail to a telephone answering service I subscribed to in the Chicago area,
348 the Arrow Telephone Service. They had sent one to that particular address. The plaintiff corporation authorized the defendant corporation to affix the words "City Messenger Air Express" to its circulars. The corporation did rescind such authority. Such rescinding of authority was made January 10, 1955. It is the same

day that the plaintiff corporation and the defendant corporation terminated their association.

352 Plaintiff's Exhibit 17 received in evidence.

356 ELIAS MANSFIELD, called as a witness on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Mullin.

My name is Elias Mansfield and I live in Los An-
357 geles, California. I am an attorney at law and a certified public accountant. I was admitted to practice before the bar of the State of California since 1928. Irving Mansfield is my brother and his wife is my sister-in-law. In July 1954 I received a telephone call from Irving Mansfield in Chicago. On August 21st or 22nd of 1954,
358 I had a luncheon meeting with Ben Fullman and his attorney, a Mr. Rose, in Los Angeles. I had a tele-
359 phone conversation with Mr. Fullman arranging this luncheon meeting and for the purpose of discussing a situation involving my brother and a possible interest in the air freight business, and, when we met that day, for luncheon, in discussing the matter between myself, Mr. Fullman and his attorney, Mr. Rose, Mr. Fullman first said to me, "I have been talking to your brother, Irving about a possible merger between our two companies." I said to Mr. Fullman, "Do you have a financial statement of your company?" Mr. Fullman said, "No, I do not have a statement with me, and; furthermore, it would be of no use to give you a financial statement because our net worth is only very nominal. We have practically no equipment. Our equipment is mostly leased and it would be of no benefit to you to have a financial statement." I said to Mr. Fullman and Mr. Rose, "Well, under those circumstances, so far as a merger is concerned

and as far as my advice to my brother, it is definitely out. There would be no point in my brother putting in
360 his company with his net worth in a merger with Mr. Fullman's company where the net worth was only nominal and I am definitely opposed to it and I will so advise my brother." Then we discussed other alternatives and I suggested, "Well, what about a new corporation, an entirely new corporation between you, Mr. Fullman, and my brother." Mr. Fullman replied that that would not be practical because the C.A.B. certificate which he had for the air freight forwarding business is not transferable. Then we dropped that and I made a further statement that under the proper circumstances my brother could pay into the then existing corporation an amount equivalent to what he valued his business, including the C.A.B. certificate. Then we talked about the value of the C.A.B. certificate and Mr. Fullman said, "Well, it cost me about $12,000 or $12,500 cash in fees and traveling expenses," and that Irving should put up an equivalent amount. Then we had some further general discussion and we con-
361 cluded, among all of us, that the next step would be to contact my brother and suggest to him that he come to Los Angeles and wind up the details. Mr. Fullman then said, "Well, that is a good idea. We will do that." I told Mr. Fullman that I would immediately write my brother about our meeting and tell him what had transpired and suggest that he come to Los Angeles. Then Mr. Fullman said, "Well, I talk to your brother every so often. The next time I talk to him, I will tell him that you are going to write him and that we both feel that it would be well if you came to Los Angeles." That was the end of that meeting.

362 A few days after our meeting, Mr. Fullman telephoned me at my office and told me that he had talked to my brother Irving since our meeting and had told him

in general terms what we had said and done, and that Irving said that he was going to come to Los Angeles around Labor Day. Then Mr. Fullman said to me that he would do anything in the world to get my brother interested in the air freight business, because he thought
363 my brother was one of the best go-getters he ever saw and knew more about the transpertation business than anyone else, and he would do most anything to get him interested.

I believe it was shortly after Labor Day in 1954 that my brother came to Los Angeles, and during his stay in Los Angeles he and I went over to Ben Fullman's office at 1414 Cole Place in Los Angeles, and discussed the situation further. Mr. Fullman again mentioned something about a possible merger between the two companies and my brother told him that that was definitely out and that he would not consider it at all. Then we discussed the possibility of a new corporation and Mr. Fullman said again that he thought that was not practical because the
364 C.A.B. certificate was not transferable. We then discussed the third alternative, that my brother put into the City Messenger of Hollywood, Incorporated, an amount equivalent to the value of the C.A.B. certificate, then we had some discussion as to the value. Mr. Fullman said that it cost him about $12,500 to get the certificate, and my brother said, "I will put in twelve thousand five hundred cash." Mr. Fullman said, "That will be all right." My brother then said, "Well, you and Al (meaning me) work out any further details necessary, and let me know when you are ready for the money, and I will send the $12,500, or send it to my brother." The con-
365 versation ended then, and my brother and I left. Irving Mansfield was to receive for the $12,500, 50 per

cent of the outstanding shares of the company. Thereafter, I had several telephone calls from my brother in Chicago, inquiring what progress was being made, and I in turn called Ben Fullman several times to find out what we were going to do and when we would be able to consummate the transaction. Nothing further happened. Then in the latter part of December my brother Irving came to Los Angeles from Chicago either to wind up the deal or the deal was entirely out. He came to Los Angeles on the 28th or 29th of December, or thereabout, and he and I went over to Mr. Fullman's office on Cole Avenue in
366 Los Angeles. My brother told him that he came for the express purpose of either consummating this deal, or else the deal was off entirely. Ben Fullman then said that since we had discussed this deal, his sons objected to it. He had a tape recording of telephone conversations he had had with his sons, one of whom was in New York and one possibly in Chicago. It was quite evident from their telephone conversations that the sons were opposed to the transaction, and so my brother said, "Well, that is the end of that," and we left.

Mr. Fullman played the tape recordings of the telephone conversation in our presence and we listened to
367 them. I believe that one of the objections given by Fullman's sons was that they did not think that Irving's putting up $12,500 was enough. From what I heard on the tape recording, both of the sons were of the same tenor. One said practically the same as the other.

I don't remember which was which, but both boys had
368 the same reasons. Another reason given by the sons was that they were unwilling to give Irving under any circumstances one half of the shares of the business. They said that there were four or five of them and Irving
369 was one and they did not want him to have one half

of the shares. My brother and I said, "Well, I guess that is it," and we left. Thereafter, I had no further conversation with the Fullmans.

370 I picked up Defendants' Exhibit 11 at the office of the Clerk of the District Court of the United States at Los Angeles, California.

Defendants' Exhibit 11 received in evidence.

Witness continues: I checked the bankruptcy records at the time that I obtained the photostatic copy of 371 the debtor's petition. The debtor was discharged in bankruptcy in 1952.

375 It was agreed by counsel that Modern Delivery Service, Inc., was discharged in bankruptcy on January 9, 1952.

Cross Examination by Mr. Cohen.

The meeting of August 22, 1954, the luncheon meeting, where I and Ben Fullman and his attorney were present, was a meeting to find some way to get together. There was no agreement to get together at that point. At the August meeting, there was no agreement that they get together.

At the meeting occurring in September 1954, Ben Fullman did not say to me that he would have to confer 376 with the other officers of the City Messenger of Hollywood corporation. I am familiar with corporations and how they deal, how they work.

377 *Redirect Examination by Mr. Mullin.*

There was no kind of an agreement until the September meeting when my brother came here.

378 ROBERT M. YOUNG, called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

379 *Direct Examination by Mr. Cohen.*

My name is Robert M. Young. I live in Chicago, Illinois. I am sales manager for Modern Teleservice, Inc. In 1954, I was employed by the predecessor to this company then known as Modern Talking Picture Service. The company has three offices, New York, Chicago and Los Angeles. In 1954, I was employed in both the New York and Los Angeles offices. From June to December of
380 1954, I was employed in the Los Angeles office. In my position I had occasion to use, in Los Angeles, City Messenger Air Express for the company by which I was employed. On December 15, 1954, I was transferred to our Chicago office. I was then salesman and assistant office manager. At that time, I had occasion to use City Messenger Air Express for expediting air shipments
381 primarily from our offices to television stations on a national basis. We have used City Messenger Air Express Service in Chicago up until this date. We used City Messenger Air Express in January and Febru-
382 ary 1955. In the latter part of February 1955, we encountered a number of shipments placed with City Messenger that had not arrived at their destination and, on that occasion, I contacted Sidney Fullman of City Messenger, Los Angeles office, in order to determine what had happened to the shipments and if there was anything that could be done to correct the situation. We continued to use City Messenger Air Express.

383 I have seen plaintiff's Exhibit 18, the receipt book. I have seen quite a few of them. This book was provided to us by City Bonded Messenger for making out

way bills on pick up receipts for shipments originated by our office.

387 In February 1955, we were dealing with both the plaintiff City Messenger Air Express and the defend-
388 ant City Bonded Messenger & Trucking Service. In February 1955, we made phone calls for the forward-
389 ing of packages by air express. City Bonded Messenger came to our place of business to pick up packages. Their messengers had badges on their hats and, I believe in some cases, wore something on their jackets identifying them as City Bonded. In January and February 1955, I called for City Messenger air shipments.
390 When I called, I always talked with a Mrs. Mansfield. I said, "This is Mr. Young of Modern Talking Pictures calling." I called for air pickup. In December 1954, *I did not make any calls from the Chicago offices.* During the month of February 1955, some air shipments were delivered late. I would, on occasions, when I was in our shipping department, see City Bonded messengers picking up film.

Cross Examination by Mr. Mullin.

I do not know how long our company had been doing business with City Bonded Messenger & Trucking
392 Service Inc. I do not know whether our company was doing business with City Bonded Messenger & Trucking Service, Inc. before May 1954. I was transferred from the Los Angeles office to Chicago on December 15th, 1954, and checked into our office here and immediately went on vacation and did not return to the office until two days after New Year's day, or the second or third of January, at which time I was actively engaged in the Chicago office. At that time we were dealing, besides the two that
393 are involved in this law suit, with the Air Express Division of the Railway Express Company. They

394 handle many shipments for us and they are on a regular pick-up basis. In other words, they make any number of pick-ups a day at our offices. We also have air shipments that are not handled by the parties involved, but are handled by messengers who pick up at our place of business, deliver to the air port, and turn it over to the air carrier. The shipment is then made in that way.

395 WILLIAM C. SCHELLI, called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

396 *Direct Examination by Mr. Cohen.*

My name is William C. Schelli and I reside in the City of Chicago. I own and operate a motor carrier operation, namely, the City Transit Line. It is located at 833 West 36th Street. It is a sole proprietorship. I am the owner of that company and I have owned it since 1937 continuously. We stopped operating from the beginning of the war until the end. After the war, we reopened and started operating again. We operate in and about the Chicago area. We have Interstate Commerce authority for the Chicago commercial zone. We have Indiana rights in Lake County, and we have Illinois and intrastate certificates covering the State of Illinois. Prior to the war, the name of my company was still the City Transit
398 Line. We rendered a feeder service to truck, rail and air. We also render special services. We rendered one special service from Chicago to Baltimore, Maryland, and return, and we also rendered special services which was a night service to the air port from the Calumet area in Indiana. We also rendered special delivery services. We were in all types of operations as a local carrier. We also

carry goods, wares and merchandise from the shipper to the air port and there turn it over to an air line. I know of my own knowledge that there are other firms in the City of Chicago operating with the name of
399 "City" in its title. There are City Cartage Company, City Express, and City Bonded. I have been in the
401 transportation business since 1927. I worked in all phases of operations in that industry.

I have never been notified by City Bonded Messenger & Trucking Service that I was infringing upon their name.

403 *Cross Examination by Mr. Mullin.*

I did not operate during the war years. I started in 1937. We then had four trailers, three tractors and one straight truck. In our business, we put the specials on
404 a small truck and made the specials. We made special delivery, but never as small as an envelope. I was never engaged in the messenger business. As to whether I have ever been in competition with City Bonded Messenger & Trucking Service, when you say, "trucking",
405 I could very easily be a competitor. I could be in competition with them. I can't say for sure whether I was in competition.

406 During the war, we closed down for the war effort. We closed down 10 days after Pearl Harbor, December 7, 1941, until 10 days after the close of the war in
407 1945. I sold the trucks and trailers to another company. In 1941, I was 31 years old. I had accounts receivable. We collected them and everything was paid off. We sold pieces here and pieces there, not all to
408 the same company. We started up again in August 1945. We bought trucks and trailers one by one. It was not a new business. We still had our original certifi-
409 cate. No one else was engaged with me in this busi-

ness. It is an individual company. The feeder service that I have is a service that is rendered to either rail, truck or air lines on a through rate basis. When we were not being operated there, we would charge our local delivery from Gary, Hammond or East Chicago to the air port, but on the motor carrier we are operated on all through rates throughout the United States, and even though they have their I.C.C. authority they do not use it, and we pick up from them, or, vice versa, pick it up and deliver to them. We are a part of the service that a
410 railroad renders to its customers.

Before the war, I had four trucks and trailers and one straight truck. I don't recall the volume of my
411 business in 1940 or 1941. My volume of business in 1955 was $84,653. Our business is 50 per cent feeder business and 50 per cent local service and special services for [redacted] customers in Indiana and Chicago. The special services comprise in picking up 50, 100 and 500 pounds, 1000 pounds, depending on the size of the order, and making a special delivery out of it. I deliver them to various parts of Chicago or into Indiana, Gary, Hammond, East Chicago, Indiana Harbor, Whiting, or vice versa. We have no minimum weight that we pick up, but we have a minimum rate that we charge regardless of weight. Our
412 charge is no lower than $3.00 for a delivery. I got my certificate of convenience and necessity at the end of 1937 or early 1938. I did not get it under the grandfather clause. We filed for a certificate of convenience and necessity at a joint board hearing in Chicago, at an Interstate Commerce hearing. The grandfather clause ended in April 1935, and I filed in 1937. On April 1,
413 1935, the tariff became effective.

414 I operate in the Loop. Depending upon size, trailers can travel in the Loop. If not, we have to get a

special permit to operate inside the Loop, which we do, when we have to. I do advertising. We advertise throughout the Chicago Transporting Club. That is the biggest part of our activity, which is made up of about 2,000 members, all belonging to air, rail, freight, water, industrials, and that, I think, is the best form of advertising. We now have 10 trailers, 5 tractors, and one straight truck.

I know of the City Bonded Messenger & Trucking
415 Service Inc. but I can't say how long. I have seen them around and I have seen their trucks but I can't tell you when.

At present I have 10 employees.

I have met the officers of City Messenger Hollywood Inc. doing business as City Messenger Air Express just
416 the other day, this week. I was called and I was asked how long I was in business and if I had any interference with our name City Transit, with any other company. I told him, so far as I was concerned, we didn't have too much interference because of the amount of advertising and people that I knew throughout the City in the transportation business that it wouldn't interfere as much. I belonged to these clubs so long that my name is practically around the city and I know all the truckers and everybody else, so, naturally, when the name comes up, they refer to me. They know me personally. They
417 know my name, which is William C. Schelli.

As far as City Bonded Messenger & Trucking Service is concerned, my business is different as to the messenger part, but when you say, "trucking", we are
418 in trucking and it could be duplicated. We do any type of trucking.

419 I have no financial arrangement whatsoever with the plaintiff in this case. I have not done any business

with the plaintiff, because we have been doing business with the regular air lines. We do hardly any business at all with freight forwarders at the present. We do no business with messenger service. A few times I received calls for messenger service and told them to call somebody who specializes in the package, envelope and messenger service business.

420 SIDNEY B. FULLMAN, called as a witness herein on behalf of the plaintiff, having been previously duly sworn, resumed the stand and testified further as follows:

Cross Examination by Mr. Mullin.

421 Our ticket service was a pickup and delivery of theater service, sporting events tickets, spectator tickets, various types of entertainment tickets, picking them up and purchasing them for theater goers at the box office and delivering them to their residences and getting paid a fee for performing that service. This was a messenger service and we found it somewhat acceptable to the business. The customers requested that we pick up tickets at a specific theater and we would pick them up for them at the theater, and deliver the tickets to them. We would advance the money and then collect it. These theaters
422 were located in Los Angeles, California, anywhere in Los Angeles, California. Some of them were located in the downtown district.

I testified that on April 29, 1947, we purchased a customer list from Modern Delivery Service and the right to use the name City Messenger and its mark in the Hollywood area, and in such areas where it would not compete with Modern Delivery Service's downtown operations. I don't consider this competing with Modern Delivery Serv-

ice in the downtown operation. It is not a fact that
423 this ad was the Modern Delivery Service ad.

424 I was born in Los Angeles, California, and I resided there for some time. The 441 square miles of Los Angeles is pretty difficult to get completely familiar with. I think it is the largest city area in the United States. I am familiar with it as any citizen can become familiar.

Hollywood was incorporated into the city of Los An-
425 geles in 1909. The city of Los Angeles surrounds it.

Hollywood is within the city limits. Being a member of the Hollywood Chamber of Commerce, I would say that Hollywood encompasses any particular territory where
426 Hollywood's influence is felt. I have seen Hollywood
427 defined in the Hall of Records, City of Los Angeles.

Where I saw it defined it did not include what is now downtown Los Angeles. Downtown Los Angeles has been increased in area. Hollywood was not a part of Los Angeles downtown on June 9, 1947.

I testified that I paid $2,547, in installments for the customer list, name, etc. I paid it to Modern Delivery
428 Service, Inc. Benjamin Fullman was the president.

It was paid by check. I do not have those cancelled checks. I do not have them available. I have a personal file but these were partnership checks. In that
429 personal file I retained a partnership tax return.

There are records of this transaction and of these payments in the books of Fullman & Chess. There are vouchers. I wouldn't know at this particular time whether they are available to me. I really don't know where
430 they are. No one specifically requested them.

I signed the complaint which was filed by City Mes-
431 senger of Hollywood, Inc. Plaintiff's Exhibit 17 is one of the instruments on which the allegation is based. It is also based on other instruments, advertisements in

the classified directory published by The Reuben Don-
432 nelley Corporation for the Illinois Bell Telephone Company, messenger receipt books for the City Bonded Messenger & Trucking Service to their customers. They were distributed subsequent to January 10, 1955. In the exhibit I think it shows exactly what was said, but I took that information from the exhibits that were pre-
433 sented to me at the time. This is one of the instru-
434 ments. It is right here, City Messenger National Credit Card. This is specifically mentioned in the allegation. Anyway, this is one of the instruments on which the allegation was based. They advertised City Messenger National Credit Card as most convenient for charging messenger service at City Messenger offices, whether New York, Hollywood, Beverly Hills, or Los Angeles. That is what it refers to. That is specifically in this allega-
435 tion. There were other documents upon which these
436 allegations were based. The chart rate folder, plain-
537 tiff's Exhibit 17, was not authorized by me to be printed by the defendant. It was not, to my knowledge, authorized by City Messenger of Hollywood, Inc., doing business as City Messenger Air Express. This to me is a rate chart, not a circular. A circular, to my way of think-
438 ing, is merely a holding out to the public of the performance of an offer. It is a type of an offer to perform a certain type of service and it is not a specific type of rate memorandum, which this is. This to me is a rate memorandum; this is not a circular. In our particular busines, we try to keep that very specific.

439 I cannot say whether Defendants' Exhibit 3, which is a letter from Irving Mansfield to "Dear Ben", dated July 1st, and mentions "our new rate chart", refers to this particular item. At that time I was in New York City. I wouldn't know whether Defendants' Exhibit 4,

dated July 8, 1954, evidently in reply to this letter of July 1st, which reads "Your brochure is very clever", refers to this. I was in New York at the time.

At the time that Modern Delivery Service was bank-
440 rupt, they owed me money. I can't recall the exact sum. It was in the thousands. They had owed me money approximately 6 months, for personal loans that I made to the Modern Delivery Service to support their
441 business. I made the loans after I left them. I never had an opportunity to offset against those loans the $2547 that I paid them.

I picked up Plaintiff's Exhibit 17 in the home of Rose Siegal in Chicago up on Margate Terrace. I was staying with her at that time and she worked for Mansfield. I saw another copy of it in my telephone answering service. She got a copy. She received it in the mail and showed it to me. I can't fix the date that she re-
442 ceived it. I saw it, and she showed it to me.

As to Defendants' Exhibit 12, I have never seen these particular colored ones. I don't recall these at all. I have a red one or green one. There appears on there the information I complained of in the complaint. It is the
443 mark on here. Another particular is "A better standard of messenger service". That was borrowed from a particular advertisement that we placed in New
444 York. That is contained in the allegations of 13-c.

[February 21, 1957]

446 Witness continues: In 1951 we did not maintain an
447 office in Chicago. We performed a special service in the Chicago area in connection with our Los Angeles operation. Pick up and delivery was ordered by a client, inviting us to perform these segmental services in the area. For instance, if they were shipping something to Los An-
448 geles and they wanted us to pick up and deliver it in Los Angeles, they would call us by long distance

phone, which was usually in connection with a convention or a travelling account executive. The pick up and delivery was normally performed at a railroad station or airline depot in Los Angeles. We didn't perform any pick up or delivery ourselves in the Chicago area. The same situation applied in 1953 and in 1952. The first time we performed any pick up and delivery service in the Chicago area was sometime after May 22, 1954. Since May 22,
449 1954, we have been engaged in pick up and delivery service here in Chicago. We are in air freight forwarding business in the Chicago area. Pick up and
450 delivery is an incidental service to our air freight forwarding. We pick up at the shipper's store door. We also deliver to the store door. The inter-city movement is by air and the delivery to his store door or pick up from his store door to the air freight terminal of the airlines is normally performed by surface transportation. A messenger service could perform that transportation depending upon the type of equipment he maintains. Some of the messenger services perform that type of ground operation of air freight forwarding. The City Bonded Messenger
451 & Trucking Service performs for us the ground operation for air freight forwarders. They have performed it for us and for others. I believe at the present time they perform it for the Hop Air Freight Company. They are freight forwarders. I have heard of Emery Air Freight Forwarding Service. In dollar volume Emery Air Freight Forwarding Service are larger than we. I don't
452 know whether City Bonded Messenger performs any services for ground operations of air freight forwarding for Emery Air Freight Forwarders. The ground operations of air freight forwarding when performed by a messenger service requires the filing of a contract
454 with the Civil Aeronautics Board. It requires appriz-

ing the Civil Aeronautics Board by the parties, by either appearance by both parties before the Civil Aeronautics Board and explaining the existence of the contract or a written agreement outlining the charges that they will make for the best performance of the services.

I testified that we had some 350 agents. These agents perform the ground operations of air freight forwarding for us in these various cities. We have a contract with each other. We have filed a blanket contract listing
455 the agents in that contract. We have listed all the
456 350. I have no copy of the written contract. We filed it. It is on file.

Since January 1955 we have not engaged in the
457 messenger service in the Chicago area. We don't contemplate operating under the name of City Messenger as a messenger.

458 I recognize Defendants' Exhibit 13. That is an application made in the name of City Messenger of Holly-
459 wood, Inc., doing business as City Messenger Air Express. The Civil Aeronautics Board letter of authority that we have permits us to engage in ground operations incidental to air freight forwarding, as a part of a through air freight movement. If a portion must move by air it is constituted under the authorization of the Civil Aeronautics Board if a through bill has been issued. It did not give us authority to operate as a surface common carrier, but it does as a common carrier in a forwarding operation. We have applied for general trucking
460 rights in the Illinois area, not messenger rights. By general trucking rights I mean as listed in the application, general commodities. That would permit us to pick up an envelope and deliver it from one place to another.

463 An air freight forwarder issues a through bill and and is responsible for the shipment from the consign-

or's door to the consignee's door. If a package is lost or damaged the consignor or consignee have a claim against the air freight forwarder. We are required to maintain adequate insurance coverage to assume that the claim
464 will be properly handled and that, with due diligence, it will be paid. The Civil Aeronautics Board will not issue a letter of authority except to a financially responsible applicant.

466 A tax lien was possibly filed against the City Messenger of Hollywood, a corporation, located at 1414 Cole Place, Hollywood, 28, California. I have never seen Defendants' Exhibit 14, which is a notice of a federal
467 tax lien. If there were a tax lien filed, I as president would know about it.

A tax lien was filed against our company last fall, but I don't recall the exact date.

468 I met Irving Mansfield once, I think, in 1949. It was for about five minutes and I didn't see him again until July 4, 1954.

I have an uncle by the name of Dave Siegal. I don't
469 know where he resided in 1932. I was pretty young at the time.

471 Defendants' Exhibit 13 received in evidence.

472 Witness continues: In 1932 I was approximately 9 years old. In 1932 Dave Siegal probably came to our house. Irving Mansfield might have come to our home with Dave Siegal from time to time, but I don't spe-
473 cifically recall the instance. I remember living in
475 Chicago with my father. I don't think that I knew that my father had at that time a business associate by the name of Irving Mansfield. I was attending junior high school then and I wasn't too much concerned with business. My first experience as a messenger was in 1938, when I worked for my father in Los Angeles.

I did not purchase any assets of the Modern Delivery Service from the trustee in bankruptcy.

476 *Redirect Examination by Mr. Cohen.*

The tax lien was removed approximately 24 hours after it was made known to us. I don't know the circumstances under which the lien was filed, but it was the policy of the company that whenever those things became known to us it would be settled immediately, and if there was any protest at all, we should pay first and protest later.

City Messenger of Hollywood, doing business as City Messenger Air Express, does not operate a messenger
477 service in the City of Chicago. It does pick up and delivery in the City of Chicago only in connection with its air freight forwarding activities. It does not do that in connection with any other activity.

I know under what circumstances and conditions the application (Defendants' Exhibit 13) was filed. Fre-
478 quently, in the air freight forwarding business, we are called upon to act for a shipper in accordance with the Civil Aeronautics Board regulations as an agent of the shipper, to avail the shipper of the most economical and expeditious form of service where our particular tariff on file may not particularly cover that service, and the direct air carrier tariff may, we are asked to act as the shipper's agent. The Illinois Commerce Commission is not too clear on that point of jurisdiction, so they have requested us to file for a permit actually to prevent any complications to arise from those activities. We received this request from the Illinois Commerce Commission on a complaint from Mr. Mansfield that we were indulging in a trucking business without a permit in
479 the City of Chicago. We employed an attorney to represent us before the Board. The attorney's name was Alfred L. Roth.

480 *Recross Examination by Mr. Mullin.*

The amount of the tax lien was $4,964.76. We have a release of lien from the United States Government.

I am familiar with the Chicago Classified Direc-
481 tory. We are listed in the Chicago Classified Directory. We are listed as City Messenger of Hollywood,
482 specifically designating who we are. Page 1230 of the Chicago Classified Telephone Directory, dated December 1956, has the following listing:

"City Messenger of Hollywood, Inc., 845 South Wabash Avenue, Wabash 2-1850" and that appears under the heading "Messenger and Delivery Service".

483 We applied under the Illinois Motor Carrier Property Act on October 31, 1956. This complaint by Irving Mansfield was filed sometime previous to that date. I was apprised of that by our Chicago office through the
484 knowledge of our agent here in Chicago. My office in Chicago told me that Irving Mansfield complained and I told the office to file with the Illinois Commerce Commission if this would clarify the situation. I don't recall the date that I was notified, but I know that it was prior to October 31, 1956, the date that I applied.

485 *Redirect Examination by Mr. Cohen.*

Defendants' Exhibit 13 has a paid stamp and the date of December 6, 1956, thereon. This is the actual date that this instrument was filed with the Commission.

486 City Messenger of Hollywood, Inc., 845 South Wabash Avenue, Wabash 2-1580, is listed under the heading "Messenger and Delivery Service" because the Reuben Donnelley Corporation said that that was the only listing we could have in the book under that particular form of service. They wouldn't list us under "Trucking". They said that that is where we would have to be because, accord-

ing to them, they figured that the name "Messenger" means "messenger", and, also the fact that they have a designation "Delivery" which is included in that. We
487 asked for a listing under "Trucking", but it was not granted.

At page 2147 of the Chicago Classified Directory, dated December 1956, I do not find the name of City Mes-
488 senger of Hollywood listed there, but I find the name of the defendant corporation listed there. The defendant corporation has two listings there, while we have none. At page 52 of the same Directory, the plaintiff corporation has no listing there. The defendant corporation has a listing under "Air Freight" and also an advertise-
489 ment which says "Air Freight, pick up and delivery, day and night service." It has a picture of an airplane and a truck. It says "Randolph 6-6001. Special Delivery service to meet all deadlines for an envelope to a truckload." Then there is a script mark "City Bonded Messenger Service, in business since 1925, Prudential Building, 216 West Hill, 193 North La Salle."

491 *Recross Examination by Mr. Mullin.*

I have heard of the Cannon Ball Bonded Special Delivery Service here in Chicago. I really don't know what type of service they render. I don't believe that they are air freight forwarders. I see their listing under "Air Freight". I have seen that in the book right now, that in Chicago messenger services which engage in pick up and delivery of air freight are listed under "Air Freight." That is the way they have it listed.

493 WALTER HERMAN BREITBARTH, called as a witness herein on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Cohen.

My name is Walter Herman Breitbarth. I reside in the city of Chicago. I run a trucking business. I own my own truck. The name of my company is City Loop
494 Express Company. It is a sole proprietorship. I have owned it now for two years. I drove for 30 years for the man who previously owned it. His name was William J. Ayer. He operated his business under the name of City Loop Express Company. That is the name that I am using now. He retired and he sold the business to me for $1000, the name, the good will, and the permits. I hold a permit from the I.C.C. I have that permit with me here. The typewritten portion
495 of this certificate of public convenience and necessity as common carrier by motor vehicle, bearing number 2255, reads:

> "Shoe machinery, shoe polish, printed matter, chemicals, light cartage and general cartage within 50 miles radius of 915 West Erie Street, Chicago, Illinois, and to transport said property to and from any point outside such authorized area of operation for shipper or shippers within such area."

As a result of that authority, I would say I can carry most anything under "general cartage." I believe I could carry something as small as an envelope. My minimum charge is $2.00. I operate in and about the Loop.

I have not, within the last two years, received any mail or any notification whatsoever from City Bonded Messenger & Trucking Service, Incorporated, or its attorneys, asking me to refrain from using the word "City" in the name of my business.

497 *Cross Examination by Mr. Mullin.*

I will be 59 years of age on March 8th. I have been driving a truck since 1916. It is my understanding that the Certificate of Public Convenience and Necessity tells me what I can do in my business. Therefore, I am governed by what I understand this to be. There was a hearing on this certificate of public convenience, and as a result of it, there was an order entered by the Illinois Commerce Commission and this came out of it.

498 In response to questions asked of me by Mr. Cohen, I read that paragraph which stated what I could do. I said that I thought I could carry an envelope. I have had no call for carrying envelopes. I don't do messenger service but I feel that under the term "general cartage", I can carry most anything. Paragraph 6 of the Certificate reads:

> "No. 6: That the Commission finds that the term 'general cartage' as contained in such certificate of
> 499 public convenience and necessity, is not a commodity description, but rather is service description and that it does not increase the categories of commodities specifically mentioned in said certificate."

I presume that to tell me that I can't carry anything more than the specific things that I said and that general cartage merely is a designation of the kind of service I am engaged in with respect to these particular commodities. I have had this certificate for two years, and I have been carrying shoe machinery, shoe polish and chemicals. I decided that I wanted to carry brooms during the time that this was going on. I felt that it would be neces-
500 sary to get permission specifically to carry brooms.

I asked the Commission to put in a special paragraph. Accordingly to that, my business is very specific. I serve the broom business, the shoe machinery business. I haul wax for shoe polish companies. I haul stationery—

printed matter—in cartons of about 100 pounds. I
502 do not carry any drawings or things like that for advertising companies. I do not carry any boxes of jewelry or anything of that kind. I do not pick up small packages and run them across town. For my customers, I have carried commodities outside of my certificate of public convenience and necessity.

503 I stated that I purchased this business from Ayer and I paid him $1000, for which I got two trucks, the name of the business, the good will, and the permits. There were two employees, my son and myself. My son is no longer in the business. I have another driver working for me by the name of Dick Merz. I do not pick up any air line or railroad tickets for my customers. I
504 do not pick up any merchandise which is in air freight commerce and carry it to the air port as part of my service.

I understand that in this case the name "City" is involved and I want to protect my name "City". Mr. Cohen, I believe, is today my attorney. When the subject came up, I was notified by him about this and I have appeared here voluntarily with this information. At the time
505 he called me, he was not my attorney. He said to me on the telephone that the name "City" in my name City Loop was in jeopardy. He suggested that I appear here as to the extent and length of time that we have had this name. I first appeared here this morning.

506 I do not know Irving Mansfield. I do not know who City Bonded Messenger is except that I just
507 heard of their name. City Bonded Messenger Service never conflicted with my business so I never paid any attention to it.

ALFRED ROTH, called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Cohen.

My name is Alfred L. Roth and I reside at 5654
508 North Bernard, Chicago. I am an attorney. I practice in the State of Illinois. I have been an attorney since
511 1938. My work primarily deals with the motor carrier industry, both from the Federal standpoint, the Interstate Commerce Commission, and from the State standpoint, it is the Illinois Commerce Commission. I have been practicing before the Interstate Commerce Commission since 1953, the inception of the new Motor Carrier Act. I have a membership card issued by the Interstate Commerce Commission. I am a member of the Practitioners Association. I have been admitted under the Interstate Commerce Commission Act. I am
512 general traffic manager of Shippers Dispatching, Incorporated, a motor carrier operating through the middle west. I have been such general traffic manager since 1938. I handle their matters before the Interstate Commerce Commission, their rate matters, their claims, and any other legal matters that they have within the State of Illinois. I also represent Knaus Truck Lines, a common carrier operating through the western territory; Babcock Brothers Motor Service; Freeman Cartage Company; Cortland Cartage Company, Inc. I represent the plaintiff corporation before the Illinois Commerce
513 Commission. I filed an application for the plaintiff as a common carrier to operate within the State of Illinois in a 50 mile radius of the two air ports of Chicago, to handle general commodities in a supplemental service as an air freight forwarder, that is, to make the delivery or pickup from the air lines at the air port.

514 Defendants' Exhibit 13 is a copy of the application I filed on behalf of the plaintiff corporation. Any carrier operating on the state highways in Illinois must have either a certificate of registration as an interstate carrier or he must have a cetificate as a common carrier providing the service he performs is in conjunction with the freight forwarding business. The Act in the State of Illinois provides for the registration of the motor carriers and the railroads in conjunction with the pick up and delivery service; but it does not provide for a freight forwarder to register for a certificate of authority. Consequently, they must secure their authority from the State.

The plaintiff corporation filed such an application up-
515 on my recommendation. A complaint is pending before the Illinois Commerce Commission filed either by Irving Mansfield or City Bonded Messenger & Trucking Service. We had an initial hearing on that complaint about 3 weeks ago. I believe the complaint was filed subsequent to the filing of the application which is Defendants' Exhibit 13.

Cross Examination by Mr. Mullin.

516 I know when I filed the application, but I don't recall when the complaint was filed. I appeared to answer the complaint. I thought it was filed after the application.

I know there are other air freight forwarders, but I do not know whether they filed applications of the same type as I have here. My filing was for general commodities within a radius of 50 miles from the two air ports, and I described the addresses of the two air ports. The service was to be rendered as incidental to the air
517 freight forwarding. The application says "General commodities except commodities in bulk and those commodities which require special equipment" and I named

the air ports of Chicago, which would indicate, beyond a doubt, that it was in connection with air freight. They have no other reason for being at the air port. There
518 is no provision in the application which requires that information. That would be submitted at the hearing. The evidence submitted would then indicate that the rights would be limited to traffic which would originate outside the state or traffic destined outside the state, so the service rendered would be in conjunction with air freight only. In those cases where bus service would be required due to bad climatic conditions, in other words, if shipper A in Toledo, Ohio, had a shipment destined for Chicago, Illinois, and he couldn't use the air lines because of bad climatic conditions, he would use a bus to whatever point he could, and they would pick it up at that point and
519 deliver it to wherever it went. It would still be supplemental service, and the traffic would still originate outside the state. My application requests that anything connected with air freight or air port could be handled by us. I am familiar with the defendant City Bonded Messenger & Trucking Service only to the extent of the testimony that was brought out. I walk down LaSalle Street and see their sign on the door.

* * *

524 Thereupon the plaintiff rested its case.

* * *

534 By Mr. Mullin: A motion to dismiss out as defendants Nadine Mansfield and Irving Mansfield. The testimony has shown they were only acting within the scope of their positions as officers and employees of the City Bonded Messenger & Trucking Service.

* * *

By the Court: I have not heard a word as to Nadine. I don't see any reason for keeping her.

By Mr. Cohen: I think the Court is correct.

By the Court: What are the names?

535 By Mr. Mullin: Nadine Mansfield and Irving Mansfield.

By the Court: Motion of the defendants granted as to them.

By Mr. Cohen: I can only say as to Nadine.

By the Court: I think as far as the evidence shows, Mr. Mansfield was acting for his corporation. The motion will be granted.

[February 27, 1957]

537 RUBIE MYLO GILBERT, called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Cohen.

538 My full name is Rubie Mylo Gilbert. I reside at Burbank, California. I am a certified public accountant. I practice in New York and California. I am self-employed. Some of my clients in the air business are Dependable Air Lines, North Star Air Coach, SSW Incorporated, Viking Air Lines, Standard Air Lines,

539 Robbin Air Lines. I am retained by City Messenger Air Express. I audit their books and records, prepare their financial statements and prepare their tax returns, and give them the benefit of my advice, analysis and conclusions based on their operations. I have been in my profession 21 years. I first started to work for

540 City Messenger Air Express about two years ago. Prior to that time I did not have any associations with the principals of that corporation. Some of the books and records of the City Messenger Air Express are

541 in my briefcase and the others are at the different offices of City Messenger. The last time I examined the books and records of City Messenger Air Express was this past week-end. I prepared the financial statement

and audited the fiscal year ended January 31, 1957. The amount of income derived from sales of air freight originating from Chicago in the year 1955 was approximately $6500.00. The amount of sales derived from the Chicago office during the year 1956 was approximately $18,000 and some odd dollars. The books and records of the company reflect the cost of operating the Chicago office. The figures that the books and records reflect are approximately $6100.00 a month, not including air express carrier charges and surface carriers. The amount spent in the Chicago area for advertising amounts to about $300.00 per month. There are two salesmen employed in the Chicago area out of the Chicago office. Three are employed in New York and two in Los Angeles. The gross sale as reflected by the company's books for the office here in Chicago for the year 1956 is approximately $18,800.00. The amount of sales originating in Chicago during December, 1955 was $666.00 and in January, 1956 it was about $1200.00. I have seen the original of Plaintiff's Exhibit 20. This exhibit purports to be a copy of the original Federal tax lien for withholding taxes and transportation taxes. The lien is recorded for alleged non-payment of Social Security taxes and transportation taxes for the first quarter of 1956. That exhibit is a certificate of discharge of taxes. The release was secured because the taxes were paid.

Plaintiff's Exhibit 20 received in evidence.

Cross Examination by Mr. Mullin.

The books of the plaintiff company, from which I gathered these figures, are under my control. They are located in Chicago at 845 South Wabash; Los Angeles, 1414 Cole Place; New York, 203 East 36th. The

bookkeeping is done in Los Angeles. The invoices and
553 bills are forwarded to Los Angeles. The billing physically is done in Los Angeles, and those sales which generate from Chicago will have a Chicago address
554 on the invoice but will be mailed from Los Angeles. They are paid generally in Chicago. There are two salesmen in Chicago. There has been a turnover of salesmen. In other words, there would be more than two, numerically, but not more than two at any one time.
555 This is my first appearance in Chicago. I have never met the Chicago salesmen. I have just seen names on the payroll data. I paid no attention to the names because they were meaningless to me. They are names I don't even know.

The billing in December, 1955, was done from Los Angeles, but they still have the Chicago address. Sometime previously they were experimenting with whether it would be more feasible to bill from the office where the sale generated or whether it would be better to bill from a central location in either Los Angeles or New York, and all
556 three were tried. Currently it is all being done in Los Angeles. It has been done in Los Angeles for about a year, that would bring it back to February, 1956. Prior to that, it was sometimes billed in Los Angeles, sometimes in New York and sometimes in Chicago, where the sale originated. I examined these books. I am familiar with the billings and so forth. I couldn't honestly say
557 whether or not the billing was never done in Chicago because the sales were so small. Experiments were made in billing at least over a year ago, over a six
558 or seven month period. I was in charge of the books and records from which the billings were made during this experimental time in Chicago. The head bookkeeper in Los Angeles is responsible to me. The bookkeepers in the branch offices are responsible to the head bookkeeper

in Los Angeles, who, in turn, is responsbile to me, which makes me responsible down the line. These books and records from which the billings were made were in my actual possession because all copies of invoices were sent to Los Angeles. At all times during the year 1955,
559 the books and records from the Chicago office were in
560 my charge. Revenues represent charges for air freight handling. We have one overall tariff. In other words, the Civil Aeronautics Board approves our tariff and that is what we charge our customer. We, in turn, have to pay to the carrier the carrier's charges in accordance with its tariff. The $660.00 gross revenues during the month of December, 1955, represents the total amount which we received and out of that we paid the air line carriers and all the other expenses involved. The same applies for the total from Chicago in 1955, the $6500.00
561 for the whole year. About $1400.00 or $1500.00 was paid to the air lines as carrier charges. In addition to that there were surface carriers that had to be paid.
562 About $600.00 was paid to the surface carriers. $300.00 per month was paid for advertising. That was only in the Chicago portion. That includes making up advertising matter, printing that is mailed out to prospec-
563 tive customers. We employed printing paraphernalia for advertising which is represented by this $300.00.
564 That was fliers and booklets—not a book in the same vein as a book that is printed; it is a booklet showing the advantage of shipping by air, what the rates would be—not all rate charts but some typical examples. It would be in the nature of a brochure.

566 I said I examined the books over the weekend. Pre-
567 vious to that time I examined them on Thursday. I am in Los Angeles at least twice a week, on an average. The books are constantly being examined. I examine cash receipts journal, cash disbursements journal, general jour-

nal, sales journal, accounts receivable ledger, accounts payable, purchases, minute book, corporate minute book,
568 stock records, sales invoices, purchase invoices and any items that I believe necessary other than those enumerated—reconciled bank statements. I am on a retainer with City Messenger of Hollywood, Inc.

570 BENJAMIN FULLMAN, called by the defendant as an adverse witness, having been previously duly sworn, testified further as follows:

571 Defendants' Exhibit 15 received in evidence.

Direct Examination by Mr. Mullin.

I can identify Defendants' Exhibit 16. It was a
572 memo that I sent to Irving Mansfield on December 13, 1954. I sent some Christmas cards along with that. The Christmas cards are Defendants' Exhibit
573 15. The Christmas card states "City Messenger Air Express, Division of City Bonded Messenger Service." I did not put that on there so that people in Chicago would identify City Messenger Air Express with City Bonded Messenger Service here in Chicago. We
574 wanted that sent out to all the people who had used City Messenger, and they were late in being printed. The printer stuck in the word "Bonded." The "Bonded" was no part of our name in New York or Los Angeles, but, because of the lateness, if we had sent them back, we would not have had any Christmas cards. The card that we had a little mark on where it says "City Messenger Service" and right at the end it says "bonded" letting them know that we had a bonded service, but the printer stuck it in as part of the name. We were adver-

575 tising City Messenger Service. The printer was not told to put "Hollywood, Inc." on there. He was told to put "City Messenger Service."

Defendants' Exhibit 16 received in evidence.

576 IRVING MANSFIELD, called as a witness on behalf of the defendants, having been previously duly sworn, was examined and testified as follows:

Direct Examination by Mr. Mullin.

My name is Irving Mansfield. My address is 5210 Blackstone. I am the president of the City Bonded Messenger Service, and I am in charge of operations. City Bonded Messenger Service is a defendant in this law-
578 suit.

577 Counsel agreed that City Bonded Messenger & Trucking Service, Inc., was incorporated on October 1, 1953, and that City Bonded Trucking Company, Inc., was incorporated on October 5, 1956.

578 Witness continues: Prior to the 1st of October, 1953, which is the date that we incorporated as the City Bonded Messenger & Trucking Service, Inc. we operated a co-partnership, Nadine Mansfield and myself. Nadine is my wife. We had operated as a co-partnership since about 1943. We operated continuously as City Bonded Messenger Service. Defendants' Exhibit 17 is a bill of sale from Irving Mansfield and Nadine Mans-
579 field co-partners doing business under the trade name and style of City Bonded Messenger & Trucking Service to the corporation known as City Bonded Messenger & Trucking Service, Inc., dated October 2, 1953. That is the assignment to the corporation, signed by myself and my wife, Nadine Mansfield. The signatures are that
580 of my wife and myself. The compensation paid amounted to around $15,000.00 or thereabouts. As a re-

sult of this transfer we continued to do business under
581 that name. We continued with the name City Bonded Messenger & Trucking Service, and added Inc. Prior to entering this co-partnership I was in the messenger business. At first I started out as a sole proprietorship, I think in 1942 or '43. Shortly thereafter I formed a
582 partnership with my wife, Nadine Mansfield. I operated under the name of City Bonded Messenger Service as a sole proprietorship. My first address was at 221 North State Street. The telephone number was Randolph 6001. I still have the same number, 6001, Randolph. We registered under the assumed name
583 of City Bonded Messenger, maybe six months or so later. I can identify Defendants' Exhibit 18. It is an assumed name certificate which was made out to City Bonded Messenger, 221 North State Street, dated September 1, 1943, signed by the County Clerk, Michael Flynn.

Defendants' Exhibit 18 received in evidence.

584 Witness continues: When we started at 221 South State Street, the leasehold was held by Mr. Harry Gordon who operated the Gordon Express & Transfer Company. He previously had the leasehold, and I occupied part of the space and paid my rent to him. Mr. Harry Gordon passed away, and I purchased the assets of the Gordon Transfer & Express Company, which had been operating since 1920. I received one of the original charters.

585 Defendants' Exhibit 19 is an assignment of the estate of Harry Gordon of Gordon Express & Transfer Co. to Irving Mansfield and Nadine Mansfield, City
586 Bonded Messenger Co., dated October 10, 1949.

587 Defendants' Exhibit 20 is an order from the Department of Public Works in Springfield, ordering and granting us certificate No. 2286, and the certificate was dated February 1940. That was the first time certificates were ever issued, because the Act was passed in 1939. Subsequent to that one had to have a certificate but prior to that time, no certificate was needed. We gradually dropped the name of "Gordon" and continued on with the name "City Bonded Messenger", and I believe in some of our ads in the phone book and also on some stationery we mentioned that we had been in business since 1925 and are continuing with the
588 business and still have some of the old accounts of the Gordon Express Company. We received, as a result of this transfer, all accounts, the good will, the equipment and the name, and also the certificate, and we continued on with the same phone number he had. I think we still have that phone number, Randolph 6-3227.

Defendants' Exhibit 21 is the original ledger that we had when we operated the City Bonded Messenger
589 Service, and all the entries are here. There were previous ones, but this happens to start with 1943. That is the sales for 1943, the volume of sales for accounts. By sales I mean the Messenger service performed for the month of September '43.

590 Defendants' Exhibit 21 received in evidence.

591 Defendants' Exhibit 22 received in evidence.

592 Defendants' Exhibits 23, 24, 25 and 26 received in evidence.

593 Defendants' Exhibits 27, 28, 29, 30 and 31 received in evidence.

596 Witness continues: Defendants' Exhibits 29 to 31 were not the first certificates that I received. There

were certificates prior to this, but in 1956, there was a law passed that we had to register for that. This certificate was issued to us in December 1953 as a common carrier of general commodities within 50 mile radius from 221 North State, Chicago. This is a certificate of authority from the State of Indiana that was issued to us and approved March 4, 1954. The certificate of public convenience and necessity as a common carrier of property was issued in August, 1954, by the Illinois Commerce Commission. The other one is a membership in the Illinois Truck Operators Association in 1947, issued
597 to City Bonded Messenger Service. There are certificates prior to this.

Defendants' Exhibit 7 received in evidence.

599 Defendants' Exhibits 32, 33, 34, 35, 36, 37, 38, 39 and 40 received in evidence.

603 Witness continues: I can identify Defendants' Exhibit 36, comprising an advertisement of City Messenger Air Express. This is a piece of advertising matter furnished to us by Mr. Ben Fullman, and to be given out by our salesmen on behalf of Mr. Willard Gilbert, who has his name on it. It has our telephone number, Randolph 6-6001, on it. This was probably about the inception of the CAB certificate, which was about May of 1954, up until about January, 1955. De-
604 fendants' Exhibit 40 represents an ad we placed in the program of the Chicago Bears' book advertising City Bonded Messenger & Trucking Service, Randolph
605 6-6001: The date is November 14, 1954. It appeared on other days, in other programs. Every home game played at Wrigley Field carried the same advertisement, and I think each game printed about 100,000 programs. I can identify Defendants' Exhibit 35 comprising the calling card and the two advertisements. These are pluggers

put out by City Bonded Messenger & Trucking Service,
606 around 1948. They were distributed up to the present time. They are still using them. Defendants Exhibit 34 comprising two blotters, one with the telephone and the modernistic messenger boy, I would say that was distributed in 1943 or 1944. The blotter on the top with the heart and the loop with the messenger boy with the script "C", was in around 1948.

607 We operate a messenger service. At the present time we have three offices, one located in the Prudential Plaza at 193 North LaSalle Street. We have a trucking terminal at 216 Hill Street which is about 1000 north, off of Wells Street, where we keep our trucks. At the present time we are operating about 75 to 80 pieces of equipment on the street. At peak times of holidays, we add about 20 more. This is special messenger work and trucking. In our office at 193 North LaSalle Street, we have four dispatchers answering the phones. We have personnel in the office of about 10, not including Mrs. Mansfield. At the Prudential Building, we have a dispatcher. At our garage at 216 West Hill Street, we have two dispatchers and a maintenance man. That is about all the help I can think of that we have. We have a total of around

608 75 to 80 messengers. We own the garage and terminal at Hill Street. That is a 85 by 100 foot big garage type building. It would accommodate, I would say, about 50 pieces of equipment, although we don't have that many trucks there. Messenger boys operate with vehicles, passenger cars, station wagons and some motorcycles. We also have at the present time about 12 to 14 foot messengers who walk around the loop. These boys are all uniformed and identified by their badges. I think that we own 12 trucks. We lease 13 trucks and they are all iden-

tified and painted with the name City Bonded Messenger & Trucking Service and the telephone number. Defend-
609 ants' Exhibit 41 is a nickel plate badge that the men wear on their caps. It says "City Bonded Messenger & Trucking Service" and it has the number of the driver, the number of the messenger. They started using them about 1948, 1949.

610 Defendants' Exhibit 41 received in evidence.

Witness continues: The badges are worn for identification. We handle a lot of valuable material, and that is why they wear it.

611 Defendants' Exhibits 3 and 4 received in evidence.

Witness continues: There is a relationship between Defendants' Exhibit 3, Defendants' Exhibit 4 and Defendants' Exhibit 42.

612 The one of July 1, 1954, the "Dear Ben", Exhibit 3, is as follows:

"Enclosed you will find a new rate chart. We will have 5,000 in the mail by the end of the month."

"Also art work for book covers O. K. and return via air mail. We are almost out of chart books."

The one dated July 8th from Ben Fullman reads:

"Your brochure is very clever. It should draw attention. Of course this alone will not bring in business, but it is still good advertising matter. One must use other means for selling his business."

This happens to be a brochure we used from May,
613 1954, to January, 1955. We discontinued using that in 1955. In our business a rate chart and a brochure is one and the same, and always has been. Defendants' Exhibit 42 is the brochure referred to in that letter.

Defendants' Exhibit 42 received in evidence.

Witness continues: In the early part of, 1951, I

614 received a telephone call from Ben Fullman asking me if I would like to join with Mercury and City Messenger of Hollywood, in rendering service to the members of the Diners' Club. He said that there was a possibility of picking up a lot of extra business there. I said, "Write me a letter about it and details about it. I think it sounds pretty good." Subsequent to that day we did sign an agreement with the Diners' Club to furnish members of the Diners' Club with messenger service in three cities, that is, New York, Chicago and Los Angeles, and each one was to bill for their own services rendered in their own locale, and the Diners' Club was to reimburse
615 each one separately for the invoices. I also received a letter or telephone call from Sidney, I think, mentioning that they were going to put out to members their first magazine or periodical called the Bagatelle, and he mentioned that we had a chance to get the back cover on this magazine for $450.00 to $600.00. I don't recall the exact amount at that time. He asked me if it was agreeable to me to go in to prorate the advertising with Mercury and City Messenger of Hollywood. He said he had some big agency that was going to write up some nice copy and sell the messenger service to the members of the Diners' Club. I said that it would be agreeable to me to be done. I think they arranged with a big agency, the Dick Brown Agency, to do some illustrations for the back cover. I think that it is one of the leading advertising agencies in cover work, and we were paying $600.00 for the back of the cover and should have some good illustration, something to ring a bell for the Diners' Club members that this service was available. The Diners' Club was supposed to take care of this advertising end of it, but about a week before the publication was to come out, I
676 got a letter from Sidney saying the advertising agency

up to that date had not made an illustration for us, and there wouldn't be any copy available for the back cover. I believe I said to just skip it and we will have other editions out and will get in on those. He said, "We can't do that. We contracted to go in on this and we are paying $600.00, and we own it, and we have to put something on there." He said, "What do you think we should do?" I said, "The best thing to do is to call Tony Roper, the owner of Mercury in New York, and ask him what to do. I don't want to be the deciding factor." I received a call about two hours later from Sidney Fullman in Los Angeles and he said, "The advertising agency and I talked to Tony Roper, and inasmuch as the agency cannot get out the illustrations within the next few days before it goes to press we have to make up something ourselves." He appointed himself advertising manager for
that particular campaign and he said, "The best thing
617 for you to do is send us some of your formats and
letterheads and let me work out something." I thought he was a capable advertising man, and I said that it was agreeable, and by air mail I sent out two or three brochures we had around the office and two or three letterheads. I know the advertising consisted of taking three letterheads, one which he chose of mine, and they had composited photostats made of it and had used it. That was the extent of our advertising printed on the back of the Bagatelle magazine, and that cost us $600.00.

[February 26, 1957]

619 I first saw Plaintiff's Exhibit 6, an advertisement
appearing on the back cover of the Bagatelle, after October, 1951, after the issue had been printed. This is
distributed to the members of the Diners' Club and
620 not the general public. There was never any approval
of that advertisement before it appeared in the pub-

lication. I sent the ones appearing here now and also sent one with the messenger boy running through the "City" script. I never gave Sidney any approval or authorization which one to put in at the time.

The number 100 on Defendants' Exhibit 41 is a number which identifies our messenger boys. The messenger boys are identified by numbers, from 100, and above 100. Then, below 100 are the truck men. We have been using badges now since 1943, to identify
City Bonded Messenger Service, up until the pres-
621 ent date. They have changed. The shield is
changed. First we had buttons and then we had an oblong plate, then this type of plate and then a plate like this previously that we had trouble with, when the nickel had worn off and it turned black. I
think this is the fourth time we have had these made.
623 In 1942 or 1943 there weren't any names of "City
Messenger" or "City Bonded Messenger" in Chicago and it hasn't been until this date. There have been other companies under the name "City", but they have never been in direct competition with us. We have many forms of advertising. We have put out about 30,000 of those dialers that you have, direct mail advertising and we are on the radio every day. Previously, we were on WGES,
but at the present time we are on WJJD daily, five
624 days a week. Defendants' Exhibit 43 is one of our
dialers. It says "City Messenger & Trucking Service, Randolph 6-6001." I think we have distributed 30,000 of these from around 1953. These dialers are inserted in the telephone and you can just dial instead of using your fingers, or something. Defendants' Ex-
625 hibit 44 is a letter opener with a magnifying glass and
has on it the inscription "City Bonded Messenger Service," the symbol, and our telephone number. These
626 were a little costly so I think we distributed only a

couple of hundred of them. I would say they were
627 distributed in 1953.

In the year 1953, Ben Fullman called me from Los Angeles, long distance, and asked me if I knew anything about the air freight forwarding business. I said, "Yes, some." He said, "How would you like to go into the air freight forwarding business?" I said, "With whom?" and he said, "Well, with myself and the boys." He meant Sidney and Elliott and I suppose Norvin. At first it took me by surprise. I believe I mentioned to him, "Ben, I don't know how you can
628 come back to Chicago and enter into an air freight forwarding business. That stigma of the bankruptcy still prevails here, and to this day we cannot live it down." I said, "We went into bankruptcy back in 1934, and the creditors lost something like $100,000.00, and that was all in c.o.d. collections. I didn't think it would be wise for you to ever come back to Chicago after being involved in the bankruptcy of Twentieth Century." That was the end of the conversation, and I told him to write at some later date, and I would give it some thought. I believe he called again in the latter part of 1953 or the early part of '54 and he mentioned that he had sent Elliot and Norvin to New York to open up a messenger service there. I said, "I don't know how you can do that, us being such good friends with Tony Roper, knowing him so well, how
629 you can go to New York and open up a business and compete against him." I don't recall what he said, but it was to the effect that I have to worry about myself; I can't worry about Tony Roper. He said, "I am still interested in having you join me in the air freight forwarding business. I would suggest that you fly to New York and look at the operations they have there and get in touch with me at some later date."

I believe I flew to New York either the latter part of 1953 or the early part of 1954. I did see the operation there. They had a messenger service in the lower east side of New York in a small store there, and Elliotf showed me around town and showed me how they were operating. I think I stayed there about a week, and I left and came back to Chicago. When I came back and told Mr. Full-
630 man about the bankruptcy he said that he would step down as president and stay in the background in an advisory capacity, and that I could become the president, and he said that Elliott or Sidney or Norvin would also be officers. I told him, "Ben, the boys are all grown up now. They are not infants or teenagers like when we were in business. As far as Sidney is concerned, with that dogmatical personality of his, I don't know how I am going to get along with him." He said, "Don't worry about the boys; I will take care of that part of it."
631 After I came back from New York I had telephone conversations with Ben in Los Angeles, and he asked me what I thought of it and I said, "I think you have the nucleus of something that could be built up." He invited me out to Los Angeles. I flew out there over the Labor Day holiday of 1954. At that time I contacted my brother and we went to Ben's office at 1414 Cole Place and started talking about the financial arrangements we could make with City Messenger of Hollywood. At first the talk was of a merger, and my brother interceded and said,
632 "Ben, what do you consider the net worth of City Messenger of Hollywood?" and he said, "The net worth of City Messenger of Hollywood is nil. We haven't any assets." My brother said, "How would you want Irving to enter into a merger when the net worth of City Messenger is nothing and with the net worth he has?" I think Ben said, "What would you suggest?" Then my brother suggested forming a new corporation, and at that

time Ben said, "You know the CAB certificate is issued under the name of City Messenger Air Express, and is not transferable, and we could not enter into a new corporation." The next talk, my brother said, "Why don't you let him buy into the existing corporation?" which at that time was City Messenger of Hollywood, Inc., I guess, and then they talked back and forth, and Ben said, "Well, that probably would be the best solution to it." And my brother said, "What do you think Irving would have to put up to become a stockholder in the present corporation?" He said, "I don't know. I would have to figure that out."
633 My brother said, "How much do you think it would cost you to obtain the permit?" and he gave a figure of $12,000 at the time, and my brother said, "Is that what it would cost for Irving to come in?" and he said that would be on the basis of $12,500 for me to become a 50 per cent stockholder in the present corporation. That was the way the deal was left at that time. We adjourned the meeting and I told my brother to take care of the details of it, and I had to go back to Chicago.

634 Defendants' Exhibit 45 received in evidence.

Witness continues: I believe Mr. Fullman and I had correspondence and a few telephone calls prior to my going there on the Labor Day weekend in 1954. Defendants' Exhibit 45 is a letter addressed to Irving Mansfield and signed by "Ben" and some of the contents mention that he had a meeting with my brother there. After
636 I returned I had further correspondence and conversations with Mr. Fullman. I believe it was in the early part of December. When I came back to Chicago, I personally started to put on a sales campaign to sell City Messenger Air Express to all of our customers and all of the dispatchers were informed to sell the service to our customers and we continued doing that until January

of 1955. They supplied us with some advertising matter that we stuffed in our bills to the customers and, on top of that, I had two salesmen that devoted, I would say, about six months of their time exclusively to try to sell
637 the City Messenger Air Express to our customers only, at the time, because we had such a big list. By the time they got around to doing that, they had enough to do, so they were out on the street trying to sell the City Messenger Air Express to our customers. I did have con-
638 versations with Ben Fullman concerning the air freight forwarding business and the part that City Bonded Messenger would play. That started in, I think, May of 1954, that we were to handle it at the time and until an agreement was reached and signed whereby we would
639 have fifty per cent of the corporation.

We engaged in air freight forwarding until the first day that the certificate was issued. I think that was May or March of 1954. The certificate of authority from the CAB was issued to City Messenger of Hollywood, Inc., doing business as City Messenger Air Express, and couldn't be transferred. Prior to that I thought that the name was going to be City Messenger Air Express. We had
640 talks about it and that was the name that Mr. Fullman said that the certificate was going to be issued in, under the name City Messenger Air Express. I believe
641 the office received a telegram on or about March or May, stating that the CAB had granted the permit under the name of City Messenger Air Express.

Quite a bit of endeavor went into trying to sell the services and the paper work and the detail, and I called Ben in Los Angeles and told him that after the Christmas rush of the holidays, "I think I will come out there," and talk to him again. I said, "This thing is

642 running away from us and we are getting involved with too much money being put into it and something definitely must be done about it." He said, "Well, O.K." I believe I flew out to California about the 29th of December of 1954.

When I arrived in California the first thing I did, I contacted my brother in Los Angeles. I said, "I would
643 like to have you come over with me to the City Messenger of Hollywood's office. I want to have a showdown on the City Messenger Air Express." He said, "Well, all right, I will be glad to." So, we went over there and we had another conference with Ben Fullman and my brother Elias was present at the time. I said, "Ben, this thing has been running away. We are involved with a lot of money. What do you intend to do?"

He played a tape recording and the tape recording
644 was from, I think, Elliott or Norvin. I don't know if Sidney was in there or not. He played back the tape recording, and I can't say it verbatim, what the conversation was, but the context of it was that they decided not to go into a 50-50 corporation with me; that there were five in their family against only one of myself, and they didn't think they were getting a good deal and they could go out to the outside, to strangers, and get a better deal than I offered them and the answer was "No." I said to
645 Ben, "Well, you know we are involved with a lot of money in this proposition. When I flew out here in September, it was all agreed upon that I would have 50 per cent of the existing corporation and I even left it up to my brother to consummate the deal; that the money was at your beck and call any time the deal was consummated." He said, "Well, that is the way this deal stands now. The boys don't want it and there's just no deal." During the conversation that we had with Mr.

Fullman in September, 1954, there was no mention made that the deal was subject to the approval of the boys. He said he was the spokesman and the father of the boys and he could control anything that was said.

647 Our present advertising in the Red Book amounts to
648 approximately $800.00 per month. At present we do not engage in the air freight forwarding business. We perform the ground operations for possibly half a dozen air freight forwarders at the present time including
649 Emery. The ground operation comprises the local delivery and pickup to and from the airport within a radius of 50 miles of the airport and in the Chicago
650 area. In addition to Emery Air Freight, some of the other air freight forwarders are Hop Air Freight, Air Freight Shippers and Flying Tiger. There are one or two others, but I can't recall their names at the present time. I believe that Emery Air Freight is giving us in the neighborhood of around $500 a week business at the present time. We started performing this service for Emery subsequent to January, 1955, when we severed the relationship with City Messenger Air Express. Prior to that we hadn't performed any services for them but they had
651 made proposals. Emery Air Freight gave us reasons for not giving us that business. I had many meetings
652 with Emery, with Mr. Clear and Mr. Connors. They were very anxious to have us perform the ground operations only when we could sever our connections with City Messenger Air Express and, until then, they never gave us one dollar's worth of business. The air lines themselves are the largest carriers of air freight, without the assistance of air freight forwarders. We have many customers who ship by air freight and do not use air freight forwarders and for whom we per-

form ground operations. A few of them are NBC,
653 CBS, Burton Brown Advertising Agency, and Modern Talking Pictures. I think Modern Talking Pic-
654 tures has been an account of ours for about five years. We started doing business with them in 1952.

655 Defendants' Exhibit 46 received in evidence.

Witness continues: After I returned from California in January, 1955, I informed the personnel of the office to discontinue handling any air freight for City Messenger Air Express. I called Ben up on the phone after my return from Los Angeles and told him not to ship anymore air freight shipments in to us and we wouldn't handle any more from the Chicago area and that I am writing a letter to all the people we were doing business with, such as United Air Lines, the Railway Express, Western Union, and discontinuing our guarantee of any credit concerning City Messenger Air Express
656 in this area. We didn't have any charge accounts with any of the air lines regarding shipping freight. We didn't have a charge account with Western Union, and I don't believe we had a charge account with Railway Express.

657 Defendants' Exhibit 47 received in evidence.

Cross Examination by Mr. Cohen.

658 In 1955 I was the president of City Bonded Messenger & Trucking Service, Incorporated. I caused the corporate name to be changed to City Bonded Messenger Service and City Bonded Trucking Company. They
659 are two separate corporations now. I do not operate any other company in the messenger service business. I do not operate any company in the air freight forwarding business. We do not operate under another name. Those are the only names we operate under. In 1955
660 I did not operate under another name. The business

I operate is primarily a messenger service business. That is the business of carrying envelopes and small packages which men can carry from one location to another. Another part of my business is trucking or general commodities. That is within a 50 mile radius of my present address. We do not have any contracts with anyone to carry general commodities into the State of Indiana at the present time. There is a possibility that some of my trucks carried general commodities into the State of Indiana
661 within the last week. I don't check calls every day.

I have three offices. I can't stay in one place. I go from one place to another. I am at the Prudential Plaza part of the time. I am at 193 North LaSalle Street part of the time, and part of the time at the truck terminal at 216 West Hill Street. The time spent in one of-
662 fice varies. It is according to the amount of details I have to do in each office. There are days when I spend all day in one office, and days when I spend half
663 a day, and times when I spend an hour or two. Messenger business comes into 193 North LaSalle. Messenger and trucking both come into my place of business at the Prudential Building, and at Hill Street, messenger and trucking both. 90 per cent of the messenger business comes to 193 North LaSalle and possibly about 10 per cent out of the Prudential Building. Should we get a call from any of the other numbers on the messengers, we have direct lines where the customer can be switched over
664 to 193 North LaSalle. This work is in and about the Loop and consists of carrying packages and envelopes. If it is a messenger on foot the maximum he could carry would be an envelope or five or ten pounds. If it is a messenger in a car he could probably carry from 25, 50 or 100 pounds. The messengers that are not on foot op-
665 erate their own vehicles. They work on a percentage

666 basis. Possibly forty or fifty messengers use their own cars in my business. We own two cars. We own twelve trucks. We use between 20 to 25 trucks in our operation of general trucking. The rest are not leased; they are employees with their own equipment. The men who use their own trucks and their own automobiles are work-
667 ing for us exclusively. They carry our permit on all their trucks. I would say about 80 to 90 per cent of our messengers are employed on a full time basis. That is eight hours a day. Practically all of these wear badges, some have shirts that are lettered up, and some have material insignia, but they are all identified.

We terminated our relationship with the plaintiff corporation in the middle of January. We tried to cease doing business with them earlier but the shipments
668 were probably en route someplace, and they dribbled
669 in up probably to about the middle of January. I caused to be filed on January 19, 1955 Plaintiff's Exhibit 21 with Edward J. Barrett a certificate that City Bonded Messenger & Trucking Service assumed the name of City Messenger Air Express on or about the 19th of January, 1955.

670 Plaintiff's Exhibit 21 received in evidence.

Witness continues: When I terminated doing business with the plaintiff corporation there was no existence of bad feeling, only disappointment on my part, that's
671 all. I did not refuse to let any of the principals of City Messenger of Hollywood enter my office to audit books relating to the business that I did for them on or about January 7th or 8th of 1955. They were in my office for ten days, auditing books. I did not cause Sidney Fullman to be thrown out of my office around January 10th or

15th of 1955. I did not have any of my employees throw him out. I did cause, on behalf of my corporation, a petition to be filed with the United States Patent Office
672 for a service mark. It was filed in the late '50's. I don't recall when. I couldn't recall unless I see the instrument.
673 Plaintiff's Exhibit 22 is dated February 1, 1955. I
674 guess that was the date I filed the Petition. It is possible that I signed some affidavits in that petition. I suppose they would be true. The application related to a service mark, a messenger boy, running through the letter "C" of the word "City". I have not filed any other application. That is the only one. I don't recall what I said in those affidavits. The statements con-
678 tained in the affidavit on page 11 and page 12 are true. It is true that I received a telephone call on January 19, 1955 from the Telephone Company, Mr. E. W. Nissen. I am not aware of the fact that the plaintiff corporation had applied for a listing under the name of City Messenger Air Express. I was advised or asked
679 by Mr. Nissen at that time if I would give up my number, and I refused to do so at that time. We still had City Messenger Air Express. We were not operating any air freight forwarding. We performed the ground operations of air freight, and still perform the ground operations of air freight. We don't have the title of
680 City Messenger Air Express. There was still a listing in the book, City Messenger Air Express, and that was still from the time we were in business with the City Messenger Air Express, the Fullmans and I couldn't take it out at that time. I believe that was Randolph 6-2391. That telephone number was secured at their request, but we received, I would say, ten calls for City Bonded Messenger on that phone to one for City Mes-

681 senger Air Express. The application for a service mark related to a messenger boy running through the letter "C" of the word "City". We have used that
682 mark continuously in our business since 1948. We have used the messenger boy since our inception in
1942. We used the script "City" since 1942, and I believe we had the prior right to use this symbol. That
683 is why we had it registered. We have used the boy continuously since 1948, and since 1942 also we have used the messenger boy. The Red Book is not our only
684 medium of advertising; it is just one of many. Offhand I couldn't tell you whether or not we advertised with that script and the boy running through the "C" prior to 1955 in the Red Book without viewing the Red Book. It is not correct that I knew that the defendant was using the same service mark in his messenger service in Hollywood, California, and in New York City. We do not have a telephone number in New York.

Defendants' Exhibit 43, being a telephone dialer
685 was purchased from Francis Sweitzer. The Glidden Company may have been the manufacturers of it, but the salesman was Francis Sweitzer. I knew of Plaintiff's Exhibit 23, which is a hand with a ball at the end, be-
686 ing a telephone dialer. They were not purchased from
687 the Glidden Company at the same time. Plaintiff's Exhibit 23 was purchased after I had distributed
688 close to 10,000 of these. Defendants' Exhibit 43 was distributed prior to Plaintiff's Exhibit 23. I did not order Plaintiff's Exhibit 23 for the plaintiff from the Glidden Company. Mr. Ben Fullman ordered them. The Glidden Company is located in the east somewhere but the representative is here in Chicago.

Plaintiff's Exhibits 22 and 23 received in evidence.

689 Witness continues: Page 13 of Plaintiff's Exhibit

22, being air bills of City Messenger of Hollywood, Inc., doing business as City Messenger Air Express, are the same as Plaintiff's Exhibit 1. I would not have
690 these air bills other than as a result of my association with City Messenger Air Express. These are the same bills that I ordered for City Messenger Air Express in March of 1954. I ordered them for City Messenger
691 Air Express. We did not receive the forms until weeks after we received Defendants' Exhibit 9 which
692 is a telegram. I worked on the copy with Mr. Fullman. As far as I can recollect I did not handle any other account for any other air freight forwarder. It was during this time that I received entreaties from Emery Air Express. I told them that I wanted to handle their business. That was part of my operation. Their answer to me was that they couldn't give me that type of business because, originally, I asked them why and they said the original tariff that was filed by City Messenger Air Express was our own tariff and it is "one of the reasons why we couldn't give you the business." We do have a
693 contract with Emery Air Express now. I don't know for sure whether that contract is on file with the CAB.
694 We have a contract with Hop Air Freight. I don't know whether the contract with Hop Air Freight is on file with the CAB.

695 I was in New York subsequent to the opening of their New York office. The exact day or month, I couldn't give you. They already had an office there. I don't recall July, 1954. I don't recall the date or the month or the year that I was in New York and had a discussion with Elliott Fullman and Norvin Fullman. It was in a part of 1954. What month it was, I couldn't
696 really tell you. I never offered any money to defray expenses for the filing of the petition. I did not agree with Ben Fullman, in December of 1952, to handle his

business in Chicago. It was prior to March of 1954 that I agreed with him to handle his business. It was
697 only on a partnership basis. His first call was in the
698 early part of 1953, from Los Angeles, long before he ever secured the permit; and it was on that basis that we discussed that if we entered into an agreement, that it would be on a 50-50 basis. I think there is some correspondence to that effect, too. There is corre-
699 spondence relating to the arrangement. I made two
700 trips out to Los Angeles. The first trip was in September, 1954. I thought the CAB permit was under the name of City Messenger Air Express and it wasn't an assumed name. I placed Plaintiff's Exhibit 1 with
701 Uarco six months before September of 1954.

Defendants' Exhibit 41 is one of our badges. We used the type and the symbol, but that particular badge, I couldn't say if we did use it in 1948. I couldn't tell
702 you when we first started using that badge. We first
704 started using a badge like that with the symbol in 1948. City Bonded Messenger & Trucking Service
705 is still using the telephone number listing Randolph 6-2391. That is the same telephone that I secured for
706 City Messenger Air Express and for City Bonded Messenger.

Defendants' Exhibit 17 which is a bill of sale
707 was executed in the lawyer's office. I believe it was executed in Mr. William Allen Nathanson's office, in October sometime, in '53 I think.

I knew Mr. Fullman was connected with one messenger service up until about 1947, the Modern Delivery
708 service. I believe they were using the name of City Messenger Service. I knew that during the time from approximately '47 to '51 Sidney Fullman and Sam Chess were in the same business, the messenger service business.
709 I have been good friends with Ben Fullman for thirty years. I think the first time I saw him after

the 30's was in 1948 when he paid me a visit here, and he was connected with some soap company or something.
711 I am not sure whether I had any correspondence with him in 1943 and 1944. That is too far back.

Defendants' Exhibit 42 is familiar to me. This particular brochure was originated between May of
712 1954 and whenever they were put in the mail, I think in July, 1954. I would say about 5,000 of these rate charts were distributed. I think 5,200 was the exact number. After January, 1955 we discontinued them. City Bonded Messenger & Trucking Service was local, but we considered ourselves national as long as we had connection with the City Messenger of Hollywood in New
713 York and Los Angeles. The telephones, Murrayhill 5-1003 and Hollywood 4-1888 and Mutual 8191 and Crestwood 5-0183 were all plaintiff's numbers.

I did not call Ben Fullman on the telephone. It was understood that I was discontinuing service in Chicago
714 when I left Los Angeles after he played the tape recorder, that we couldn't have a 50 per cent share, and I told him at that time, "Ben, I don't want to represent you or want your name in Chicago in the City Messenger service. It is too conflicting with ours." We are in conflict, for they are performing the same service. City Air Express performs messenger service in Chicago.

715 *Redirect Examination by Mr. Mullin.*

In 1943 I filed under the name of City Bonded Messenger Service. I filed under the Assumed Name statute in
716 January, 1955. I am familiar with the statute, and I knew I had to file an assumed name in the City of Chicago, inasmuch as we held ourselves out as being City Messenger Air Express in this area and we were responsible for all bills and everything, on the advice

of my counsel who said I should register it under an assumed name.

There are two reasons why I formed two corporations. The main reason was union affiliations. They put pressure on us that as long as both of them were together the messengers would have to join a union.
717 That was the main reason. The second reason was taxwise. My auditors advised me to form two corpo-
718 rations.

Defendants' Exhibit 9, from Ben Fullman to me, stating the CAB approval was issued to City Mes-
719 senger Air Express meant to me that the certificate was issued in the name of City Messenger Air Express and no other name.

NORVIN FULLMAN, called by the defendants as an adverse witness, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Mullin.

720 My name is Norvin Fullman. My residence address is in California, 1258 Sweetzer. My business address is 845 South Wabash, here in Chicago. I am with City Messenger of Hollywood, Incorporated. I am the secretary-treasurer. I have several duties. Presently, I am the regional manager here in Chicago. It covers Minnesota, Missouri, Michigan, the whole midwest. I have
721 been the midwest regional director of City Messenger of Hollywood since about August of 1956. I am pretty familiar with the operations of the regional office here in Chicago. Our agents in the midwest are under my
722 charge and direction. These agents do have offices. I do not occupy their offices, but I am visiting back and forth and overseeing the various operations they have. I believe we have telephone listings in some of those agents' offices. I am not sure which ones. I would

have to check the books for that. We have several. I would have to get those out of the main books, and
723 they are in Los Angeles. Air freight forwarding operations are conducted here out of the Chicago office. We do not engage in any messenger service. To my recollection we have never engaged in any messenger service. Since August we have not. We filed an application for a
724 certificate of necessity and authority because according to some of the rulings in the State of Illinois—and the states differ—I was not quite sure about it myself, and we wanted to cover ourselves in any case, because, although we are performing our type of service, some of those might fall in a different category. Although under the CAB it might be correct, it might not be according to
727 what the state would allow. I am not sure of the date when City Messenger of Hollywood, Inc. first began to
728 transact business in the State of Illinois. I can't recall the date because I was not in the area at the time.

Defendants' Exhibit 48 received in evidence.

Witness continues: From March, 1954, to January,
729 1955, I was secretary and treasurer of the plaintiff corporation. We do have an employee by the name of Faye Baker working for us. I can't recall the exact date he came to work for us. He has on his application, I believe, from what he said, that he worked for City Bonded. He is an expediter, a driver. He picks up and delivers
730 from the air port. If a shipment might come in by some other form of transportation, he would pick it up at the terminal somewhere in the city. It might not be the air port. That would depend on what the facilities would call for, and what we would have to use for transportation to and from various cities. He would pick
731 up at bus terminals, railroad terminals and deliver

them. We have five employees in the Chicago office. We employ two salesmen, including myself. The other salesman is Richard Rumchaks. We do have an employee by the name of Aaron Mallory working for us. I would
732 not know that he worked for City Bonded Messenger & Trucking Service, Inc., without checking the records. We operate about four pieces of equipment in Chicago. We don't own equipment of our own. It is
733 leased equipment. We have received telephone calls from customers seeking messenger services. We referred them to Cannonball. They have asked if we can make a pickup for them and, of course, we answer, "It is CMAX, City Messenger Air Express," and they say "Can you make a pickup for me?" and, we say, "To what city is it going to?" and they say, "It is local," and we say, "This is City Messenger Air Express; we are air freight forwarders. Do you have something going out of town?" and they say, "No; it is local," and we say, "Why don't you call Cannonball?" Sometimes they ask for a recommendation and sometimes they hang up. To my knowledge they do not ask if we are City Bonded Messengers & Trucking Service.

735 IVY GOOTNICK, called as a witness herein on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Mullin.

My name is Ivy Gootnick. My residence is 4814 North Albany, Chicago. I am employed by Chicago
736 Salesbook Company. I have been employed there for more than 25 years. I know the defendant in this case, City Bonded Messenger & Trucking Service, Inc. I have known Mr. Mansfield since, I would say, in the latter

part of the 1930's. I am a sales person. My
737 official title is secretary-treasurer. I have done business with the City Bonded Messenger Company. Since their inception in 1942, I have been doing business with them. We furnish their receipt books and delivery
738 books. I can identify Defendants' Exhibit 49. We made that. That is a receipt book. We have our imprint on the bottom. We have been making those for them since their inception. It would be pretty difficult to say how many we have made since 1942 because they ordered every year and they would change quan-
739 tities in the years. I wouldn't be able to say. We have been making the printed cover ever since the book was printed. We have been using that cut of the little boy in it since 1948. Prior to that we have used cuts. I know they have used that cut. I am pretty sure we used that. I wouldn't say definitely, but I know in 1948 we
740 used that cut for sure. I don't recall whether there was a messenger boy on the previous cuts. Those books are rendered once a year. I can identify Defendants' Exhibit 6. We have our imprint on the inside. We made
741 these books for City Bonded Messenger & Trucking Service. I think an order for that came in May of 1954. We only made that once, with that
742 printing on it. I don't recall the date of the last order for Defendants' Exhibit 49. I don't recall what
743 the quantity of the last order was. I think it was 3,000. We printed over 4,000 of the books constituting Defendants' Exhibit 6. There was a partial shipment made to New York, a partial shipment to Los Angeles and the balance to Chicago. There were 2,000 shipped to Chicago, 1,000 each to Los Angeles and New York. We have been paid for the printing of the Defendants' Exhibit 6 book. There was a considerable controversy, but

I was told that I had to receive half of the payment
745 from Los Angeles and the other half would come from Chicago. I received my Chicago half but I had to ask an attorney to collect the half from Los Angeles. That was collected from the plaintiff in this suit.

746 Defendants' Exhibits 1, 17, 43 and 44 received in evidence.

Cross Examination by Mr. Cohen.

Our company manufactures Defendants' Exhibit 49 for defendant.

748 Defendants' Exhibit 49 received in evidence.

ANNE M. LOMBARD MAURICE, called as a witness on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Mullin.

My name is Mrs. William Maurice—Anne M. Lom-
749 bard. My residence is 3180 North Lake Shore Drive.

I am acquainted with the defendant in this case. I am not presently employed. I was employed by the defendant at one time. I was employed with Mr. Mansfield when he worked with the Cannonball for the years 1938 to approximately 1943 or '42, and then at the inception of City Bonded Messenger, 221 North State, from 1943
750 to approximately January, 1956. Originally I started out with Mr. Mansfield as secretary and soliciting business on the telephone, and regular general office work. When I left the company I was an officer of City Bonded Messenger, Incorporated. I am not presently an officer. We started out and formed the City Bonded Messenger Service with a driver and one truck which Mr. Mansfield owned. It was a very small office, and we had space with the

Gordon Trucking Company. It was messenger and
751 trucking service. In 1943 or '44 Mr. Gordon passed away and Mr. Mansfield purchased the rights and assets of the Gordon Trucking Service. Mrs. Nadine Mansfield is a personal friend. She has been active in the business since practically the business inception, the first year or second year. I started out originally with Mr. Mansfield as an individual. It was originally a sole ownership of Mr. Irving Mansfield, and then it became a
752 partnership in the first or second year. Mr. Irving Mansfield and Mrs. Nadine Mansfield were the partners. That partnership continued until approximately 1953. Then it was made a corporation. It continued under the same name, City Bonded Messenger Service & Trucking. City Bonded Messenger & Trucking has used symbols through the years. They have used a variety of forms, from messenger boys, trucks, little motorcycles, little boys next to a truck, little messengers
753 on the C coming through the "City" Bonded. The service mark, comprising the little boy with the word "City" and the little car there, has been in use since approximately 1948. I believe it has been used continuously since then.

I am acquainted with the plaintiff. I am acquainted with Mr. Elliott Fullman. He came into the office in 1948 at 217 North LaSalle Street. He worked for Mr. Mansfield part time as a salesman, and also helped in the business advertising. I met him prior to that in 1945, when he came through, and Mr. Ben Fullman, I believe I met for the first time in the office of Cannonball, and I had seen him prior to that with
754 Mr. Mansfield when I was a cashier in a restaurant at Henrici's in the Merchandise Mart. I was present at several conversations. I didn't participate in them, but

Mr. Fullman came to the offices of the City Bonded Messenger at 193 North LaSalle Street, in 1953 or 1954, the early part, and they were discussing the business of air freight forwarding. The conversation was between the two men and I was present. Mr. Ben Fullman came through from Los Angeles, on his way to Washington with regard to the CAB permit, to gain an approval, which he discussed with Mr. Mansfield in the office. I did not
755 overhear any of these conversations verbatim. I couldn't repeat their conversation verbatim. It was with regard to this particular subject, approval of the CAB permit, and Mr. Mansfield and he were negotiating for this new air freight business. I believe I overheard the conversation in March of 1954. He was on his way to Washington. Prior to that he had been in the office and they were discussing things that I didn't participate in, but I was given to understand by Mr. Mansfield in the presence of Mr. Fullman that this was to be a new
756 corporation. Mr. Fullman was in the office discussing the CAB permit, the approval he had hoped to gain when he visited Washington, and then he was going to New York, and he asked Mr. Mansfield to discuss the accounts and operations of City Bonded Messenger, and that it was very good for us to be performing this ground operations, that our account was so well established, that we had between two and three thousand accounts at that time, and we would get in perfectly. I was given to understand at that time that Mr. Mansfield was to be an officer of this new corporation, which was to be a private corporation between the Mansfields and the Fullmans.
757 This was the City Messenger Air Express. After this conversation Mr. Elliott Fullman came to our offices, and he had space and worked in and out of the office and worked with our salesman, Mr. Gilbert, getting acquainted, and our Mr. Gilbert took him to see the accounts. They

were negotiating and preparing to get this business started for CMAX. During the Labor Day weekend in 1954, Mr. Mansfield went to Los Angeles and returned in a
758 week.

[February 25, 1957]

761 Defendants' Exhibit 50 is a letter from Western Union Telegraph Company addressed to City Messenger Air Express, dated October 9, 1954. Defend-
762 ants' Exhibit 51 is a letter from Western Union Telegraph Company addressed to City Messenger Air Express, 193 North LaSalle Street, dated January 10, 1955. Defendants' Exhibit 52 is a letter from the Railway Express Agency addressed to City Bonded Messenger & Trucking Service, 193 North LaSalle, dated August 11, 1954.

Defendants' Exhibits 50, 51 and 52 were received in evidence.

Witness continues: In January, 1955, we were advised
763 in the office that our relationship with City Messenger Air Express had been severed. We no longer continued to take calls for air freight forwarding after that date. When a call came in for air freight forwarding we advised them we could take care of their service to the airport, but they would have to act as their own shipper or consignor beyond that, and that they would have to have somebody pick it up themselves. At the time I left the employment of City Bonded Messenger it was January of 1956 and that was after the peak season, so our employment was down. It was about 60 or 70. At the time I left we were picking up Emery Air Freight Forwarders' shipments from the airport and distributing them in the city. I imagine
764 the relationship began in the spring of the year, the early part. I couldn't say for sure. Mr. Mansfield had that arrangement. It was the spring of 1955.

Cross Examination by Mr. Cohen.

765 I had been associated with Mr. Mansfield when he worked with Cannonball in 1938 and 1939, and with Mr. Phillip Rosran. I was employed in 1943 by Cannonball. I was employed by Mr. Mansfield at City Bonded around September of 1943. I worked for him continuously from that date until January, 1956.

I gradually worked up from secretary to an
766 officer of the corporation. I respect Mr. Mansfield. In March of 1954, we had a general office downstairs and we had a balcony office. I was in all offices, upstairs
767 and downstairs, depending on where I was needed. Mr. Fullman and Mr. Mansfield were sometimes in the lower general office and sometimes upstairs in the balcony office. I was working in both offices, depending at what time. There were conversations generally in the office upstairs and downstairs. I cannot be specific in that matter. I was upstairs and downstairs 500 times during the course of the day. That is why I couldn't give you the conver-
768 sations verbatim. I didn't hear the entire conversation. I only heard snatches of that conversation. After that conversation, we were all informed by Mr. Mansfield in the office what the conversation was about. That was
769 March, 1954. We were informed in May, generally.

I did hiring, training and interviewing. Complete records were in the file. As to Elliott Fullman's salary, that was an arrangement between Mr. Mansfield and Elliott Fullman. I did not make out his payroll. He was doing part time work at that particular time. He was selling a lamb mold to the department stores and came to the office to see Mr. Mansfield and they had a discussion about

his doing part, time selling and advertising. The lamb mold is a cake form for an Easter cake.

Defendants' Exhibit 41 is a messenger badge.

771 WILLIAM HANSON, called as a witness on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Mullin.

My name is William Hanson. My address is 2105 Seward, Evanston, Illinois, and my business is advertising. I am connected with Cuttner & Cuttner, Incorporated, at 646 North Michigan Avenue. I am a production manager. With the exception of 7 months, I have been associated with them since 1944. I have been production manager since 1944. I am acquainted with the defendant in
772 this case, City Bonded Messenger & Trucking Service, Inc. I have known the defendant since 1944, ever since I have been in business. I have conducted business with them. We call them on the phone and have them make pickups, sometimes at our office and sometimes at our clients' offices, pickup and deliveries. Referring to the first week in December, 1956, pertaining to a pickup and delivery, we use a photoengraver in Peoria, Illinois. We do quite a bit of business with them, and when we started
773 doing business with them we made a business arrangement with City Bonded that the engraving company, when they had packages and advertising proofs come into our office, they would send them up by Trailways bus; they would forward a letter in the mail the same day to City Bonded, which would receive it the first thing the next morning, go over to the bus depot, pick up the package and then deliver it to the office. The engraving plant did not have an office here in Chicago or any delivery service of its

own. Then it worked in reverse. When we had packages to go down to Peoria, we would call City Bonded, have them make a pickup at our office and they would take it over to the bus depot and see that the ticket was purchased and
774 the package was put on a bus to Peoria. On December 3, 1956, I had some proofs and art work due up from Peoria that morning. Normally, we would have our packages at our office from 9:00 to 10:30 in the morning, depending on the traffic and the circumstances, et cetera. On this particular morning when I did not have my packages by around 10:30 or 11:00, I called Peoria on the phone and found out that the package had gone up the night before on the Trailways bus. I called City Bonded and asked them why they hadn't picked it up and they told me in the office that their man did have the pickup and they were surprised I hadn't received it. I then called up the bus depot and talked to the man who takes care of the packages in the package room and he told me that the package had been picked
775 up. It was a very rush job, which is the nature of our business. I had to wait and I didn't get any package and finally, in the afternoon—I don't recall the exact time, but it was sometime after lunch—a messenger—and, if I can remember right, we were busy at the time—it was a colored man that came in and he just brought the package right at the edge of my office and
776 just said, "Here is a package here." I think that he had a cap on with a different kind of identification than the City Bonded Messenger. In fact, quite a few of them we know, not by name, but we recognize, because they are in and out of our office so much. The man had,
777 if I can recall, on his cap he had a square—now, I can be wrong—but it was like a brass badge with the word "City" on it but I couldn't read the whole thing.

So, to me, the word "City" meant like City Bonded, and I started bawling him out as to why he was so late and he did know anything about anything and he just dumped the package and left, but we were never billed for that package at all, for that delivery. We were never billed by City Bonded Messenger.

779 Defendants' Exhibit 41 is not the badge that was worn that day. I would not say for sure that I would recognize that badge if it were shown to me. I can recollect a colored boy coming in, probably in his early twenties. I think he wore glasses, but I am not sure. To me it wasn't an important incident as to who he was. I was interested in getting my package and all I can remember is that word "City" and that's all. We never employ the services of an air freight forwarder directly. An advertising agency works entirely different than most companies

780 do. That is, I sit at a desk and order things over the phone and O.K. proofs but I don't do any of the actual work myself, as far as doing this—making the setting type or making engravings. We can O.K. them, we order art work, we order engravings and we order the sources to ship the plates to, the different publications, newspapers and magazines.

We never employed an air freight forwarder in connection with Peoria Engraving, regarding proofs or plates.

781 JOHN F. ROONEY, called as a witness herein on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Mullin.

My name is John F. Rooney. My address is 6146 South Mayfield Avenue, Chicago, Illinois. My occupation is advertising. I am associated with Swift & Company as

782 a manager. I have been a manager with Swift & Company since 1944. I am acquainted with the defendant in this case, City Bonded Messenger & Trucking Service. I have been acquainted with them since December of 1944. That was the time I became manager of this department. We have engaged in business with them. Whenever we had any material to be picked up in the city or delivered we would call City Bonded Messenger Service. They have been doing this for us since December, 1944. Prior to that time I understand they had been doing business with City Bonded Messenger Service. They per-
784 formed services for us continuously since that time.

ROBERT CHARLES McARTHUR, called as a witness herein on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Mullin.

My name is Robert Charles McArthur and my ad-
785 dress is 5643 North Glenwood, Chicago, Illinois. I am assistant to the traffic manager of The Admiral Corporation, 3800 West Cortland Street, Chicago, Illinois. I have been employed by The Admiral Corporation since August of 1955. I have always been in the same capacity. This is a file of the City Messenger Air Express freight bills. These are records of The Admiral Corporation.
787 The bill, dated 9/24/56, is a bill of the City Messenger Air Express. It refers to a pickup at the Greyhound bus depot, to be delivered to the Admiral Corporation in West Chicago, Illinois. That is a shipment from the Stand-
788 ard Oil Company in Bangor, Michigan, consigned to

the Admiral Corporation in West Chicago, Illinois. The shipment was forwarded by Greyhound bus from Bangor to Chicago, where the City Messenger picked it up and delivered it to our place in West Chicago. The reason for the use of Greyhound bus is that Bangor, Michigan is an off-line point as far as transportation goes, and since we want this to be expedited service to our plant in order to meet production, it is handled that way. We never used air freight to make a shipment out of Standard Oil in Bangor, Michigan. Bill No. 45147, dated 10/1/56, referring to the pickup at the LaSalle Street Station for delivery to the Admiral Corporation at 3815 West Armitage, is a shipment from the Formalite Corporation, Marshall, Illinois, consigned to our plant
789 here. It is due to production changes that we have to have expedited service, and it is sent by rail to where the City Messenger picks it up and delivers it to our plant by rail express. I know the defendant in this case, City Bonded Messenger & Trucking Service, Inc. I have done business with them. It is possible that I have done business with them prior to September 24, 1956. I don't know. I would have to check my file on the City Bonded first. I believe there was.

790 Defendants' Exhibit 53 received in evidence.

791 *Cross Examination by Mr. Cohen.*

I came to work for The Admiral Corporation in August of 1955. I am the assistant to the traffic manager. It is my job to get these expedited shipments. With regard to City Messenger Air Express, we go about ordering that service in the following way: Our expediter or purchasing department calls and tells me that there is a shipment coming out of somewhere from one of our suppliers, and asks that we handle it in an expedited manner so we

can get it into one of the plants to be expedited and meet a production schedule. After that it depends on where it is from. If it is in Bangor, Michigan, he calls and
792 tells me that they have placed it on the Greyhound bus, and I call City Messenger or City Bonded—we usually split it 50-50—and have them arrange to pick it up and deliver it to the proper plant. I never called the City Messenger Air Express and asked them to pick up the package in Bangor, Michigan. They have picked up in Newark, New Jersey. I am not sure of the name of the company there, but it is listed in the file, and to forward it by air to Chicago, where it is delivered over to our plant in West Chicago or Harvard, Illinois. You will find the airway bills attached to the back of that file as you go back, on shipments out of Newark, New Jersey.
793 All the air bills are attached to all of the slips of paper here.

794 CHARLES H. CUNY, called as a witness on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Mullin.

795 My name is Charles H. Cuny. My address is 11834 Eggleston Avenue, Chicago. I am a credit manager for United Air Lines. I have been credit manager for United Air Lines since February of 1945. I was acquainted with the parties to this lawsuit, referring to the plaintiff and the defendant, City Bonded Messenger & Trucking Service, Inc. I do not believe that prior to August 22, 1954, the defendant City Bonded Messenger & Trucking Service, Inc., had a charge account with us. I wouldn't be sure of that. The plaintiff, City Messenger of Hollywood, Inc., doing business as City Messenger Air Express, had an acount with us. They were making shipments, I be-

796 lieve. I believe they had charged a few bills prior to that time. That was August 22, 1954. Referring to that date, there was an inquiry from our Los Angeles office. I believe we may have accepted a few shipments and we placed them on a cash basis at that time. That was approximately August the 10th or 11th, as my file recalls, of 1954. On August 22, 1954, there was communication with Mr. Irving Mansfield. He phoned me in regard to the reasons for not granting terms to the plaintiff and what the conversation was, I do not recall, but it ended up that Mr. Mansfield's company told us they would guarantee the account and I believe gave us the name
797 of their bank, which we checked. They gave us the name of the bank so we could check the credit of the defendant. After we checked the credit of the defendants I wrote Mr. Mansfield to send me a letter guaranteeing the credit of the plaintiff and such letter was sent to me, I believe, on August 22nd, and as a result of that we granted further credit to the plaintiff. Defendants'
798 Exhibit 10 which comprises a letter dated August 23, 1954, on United Air Lines stationery and bearing the signature of C. H. Cuny, credit manager, addressed to City Bonded Messenger & Trucking Service, 193 North LaSalle Street, is my letter. That is the letter I referred to in my testimony. That is my signature.

Defendants' Exhibit 10 received in evidence.

Witness continues: After this incident of August 22nd and 23rd of 1954, Irving Mansfield sent me a letter on
799 August 24th, as I had requested, and in this letter he guaranteed the credit of the plaintiff. On January the 10th of 1954, he wrote me a letter canceling this arrangement of guaranteeing credit for the plaintiff. The letter is dated 1954, but, actually our receiving stamp shows 1955. I would presume that was a typographical error.
800 The letter reads as follows:

"On August 23, 1954 we agreed to guarantee credit charges for City Messenger Air Express of Hollywood, California. We are presently severing our financial arrangements with City Messenger Air Express of Hollywood, California. We are, therefore, notifying you as of this date, January 10, 1954, we will not be responsible for any further credit issued by United Air Lines to City Messenger Air Express of Hollywood, California.

"We do wish to thank United Air Lines for the courtesy extended City Bonded Messenger & Trucking Service.

"Should our company desire credit in the future, we
801 will again call on United Air Lines."

Signed: "City Messenger & Trucking Service.
"Irving Mansfield, President."

To the best of my recollection there was no statement made to me or to my company concerning the financial responsibility of the plaintiff by the defendant.

802 *Cross Examination by Mr. Cohen.*

The credit office for the entire operations of the United Air Lines is located at 5659 South Cicero Avenue, Chicago. I would like to qualify that our local air freight offices do make credit decisions based on standards which we issue to them from Chicago here. When any question arises as to policy, they refer it to me. I do not know whether or not Mr. Mansfield in this conversation of August 22, 1954, was specifically asked by me to guarantee the credit of the plaintiff. I kept no record of that conversation. I only have the presumption of what might
804 have happened. There are some telegrams in here from our own people in Los Angeles, where there was evidently some possible request, between the plaintiff and our office, as to why we had not advanced them credit.
805 I don't believe I had a conversation with Mr. Irving Mansfield on January 10, 1955. My records do not

indicate that I had sent a letter to Mr. Mansfield and the defendant corporation on that date. I received a letter on the 10th from the defendant corporation.

807 ROSE SIEGEL, called as a witness on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

808 *Direct Examination by Mr. Mullin.*

My name is Rose Siegel. My present address is 1065 West Hollywood, Chicago, Illinois. I am a dispatcher in charge of the Prudential office of City Bonded Messenger Service. I have been engaged in that position since the opening of the Prudential office in November of 1956.

809 Prior to that I was employed at the City Bonded Messenger Service at 193 North LaSalle Street, about 6 years. I was bookkeeper and part-time dispatcher.

I am acquainted with the plaintiff in this case, City Messenger of Hollywood, Inc., doing business as City Messenger Air Express. I am also acquainted with its officers. I am a sister-in-law to Ben Fullman and Aunt of Sidney B. and Norvin Fullman. I am not related to any of the officers of the defendants.

810 Referring back to the time that I was employed in the office of the defendant on LaSalle Street, my desk was in the back bookkeeping office on the lower floor. For dispatching, I was in the front office at the dispatch

811 desk. Mr. Mansfield was in the office in April, 1954. During that month I believe he took a trip to New York. He informed us of his whereabouts. He was going to visit the office of the City Messenger of Hollywood in New

813 York City. After he returned, there were preparations made for a new type of business. Mr. Mansfield explained the operation that we were going to go into. He

814 explained the pickups and deliveries that we handled from the airport, and part of the new division that we were going to go into. I know there was the printed matter that we ordered and he filled out a sample form for us to follow and instructed us as to the way to handle it, and how to write it up when the calls were to come in, and the pickups and deliveries on the other end and how to contact the different agencies that they had set up, to continue with the deliveries. The printed forms were ordered
815 from Uarco. We called the printed form CMAX air bill. It looks like Plaintiff's Exhibit 1. I did not prepare the form. I merely placed orders on them.
816 I did not see the copy of the form before it was printed.

817 I know the volume of business that is transacted by the City Bonded Messenger, the defendant in this case. It varies from month to month. We have peak months and slow months. During a peak month in 1954 it was $35,000.00, and during other than a peak month
818 it was about $30,000.00. I am speaking of 1954. I don't know what it was in 1956. I was not the bookkeeper at the time. I took a leave of absence in 1955. In 1955 I would say about $33,000.00 or $35,000.00. It is a matter of 2 or 3 on each side.

I know that the defendants handled business for
819 Emery Air Freight Forwarders. I don't recall the exact date when they started to do business with Emery Air Freight. It was sometime in 1955. I didn't witness any meetings with any of the officials of Emery Air Freight in our office. All the contacts I ever had were phone calls. I answered a couple of phone calls
820 from some representative of Emery Air Freight. Mr. Mansfield wasn't in the office at the time and I answered the phone. They asked me if I could quote rates

and I told them Mr. Mansfield would be the one to do that, and they left a phone number. I don't recall the name of the gentleman who called. That was in the spring of 1955. I don't recall any conversations or any phone calls prior to that with Emery Air Freight. I would like to
821 correct my previous statement, I think it was in the spring of 1954.

822 I recall visits in my home by the officers of the plaintiff. Sidney Fullman stayed with me. Elliott Fullman
823 visited my home in the early part of December, 1954. Elliott Fullman drove me home and he came upstairs to visit and see my children. I invited him to dinner.
824 He questioned the assets of Mr. Mansfield of City Bonded Messenger Service and asked me what Miss Lombard was making as a salary, and I told him that I didn't know as I wasn't in the payroll department. He stated a figure and I said, "I imagine that is it." He said, "Well when we get in there we will have to get rid of her. She is overpaid." I asked him after 17 years of service? and he said, "Yes, that is just it. She has been there too long." Then I said, "I guess you will be
825 getting rid of me?" and he said, "No, we can still use your services." That occurred in December of 1954, before Christmas.

In the beginning of January about the 5th or 6th, 1955, Mr. Sidney Fullman came into the office and told me that he was driving his brother's station wagon back to New York. Elliott Fullman had left for New York and left his station wagon behind, and he came in to drive it back to New York, and he was leaving the next day, and he asked if I knew of a place where he could stay, and I said
826 he could stay at our home provided he didn't wake us up, because he had to leave at 3:00 o'clock in the morning, and the next morning he was still there, and

827 he stayed a month. There were many conversations. They are kind of muddled in my mind at the present time. There was more conversation in the office than in my home after that. Mr. Mansfield of City Bonded Messenger Service was severing his connections with them, and he asked Mr. Sidney Fullman about paying the bill, and Mr. Sidney Fullman said he didn't like the way the bill was presented, that he would like us to itemize that and put all items on a big sheet, and we don't ordinarily do that in our bookkeeping department, but he proceeded to show us how he wanted it, and it took me six weeks
828 to set it up. The Telephone Company had to be called, and they gave me an itemized list of every telephone call, and whether it was collect or not, and where, and we presented it. I believe it was presented to the Fullmans. I started working on that. That was about the 6th, and it took me about three weeks thereafter to work on it. He helped me with a few, to show me how to set it up, but an argument happened between Miss Lombard and Mr. Sidney Fullman because he questioned every item that was put on the draft, and there was six months, and sometimes as many as 20 or 25 calls a day, and each one of the calls would have maybe ten to twelve entries, and each one was questioned, and at that rate I thought I would never finish it. I recall what was represented on
829 that big sheet. For example, we would list the air line it came into, like Eastern Airline, and the freight manifest or air bill number of the air line, and give then the CMAX air bill number and sometimes there would be as many as 10 air bills on that one shipment, and each one would have to be listed separately, and then our delivery charges for picking it up, and then our charges such as transhipments. There would be sometimes 10

CMAX air bills, really going to different cities, and we would have to make phone calls or telegrams or have other "on" charges such as cab companies or delivery agencies in the respective towns where it was going to, and we
830 would have to list the telegraph charges or the Western Union charges, rather, and the "on" charges of whatever company delivered it at the other end. I would like to list our check number and the amount of money that was paid to the company for our "on" charges for the City Messenger Air Express.

831 By Mr. Mullin: Q. Who paid them?

By Mr. Cohen: I object.

By the Witness: A City Bonded Messenger.

By the Court: If anyone did.

By the Witness: City Bonded Messenger Service.

By Mr. Mullin: Q. Do you recall what the total was?

By Mr. Cohen: Objection. If your Honor please, counsel here has become involved in, as we advised the Court earlier, in litigation that was pending in the Municipal Court of Chicago and which has been settled.

By Mr. Mullin: I am trying to prove damages, your Honor, and how much was expended by this company on behalf of City Air Express.

By Mr. Cohen: If the Court please, there was a settlement of all the issues pending in the Municipal Court of Chicago, and those issues pending in the Municipal
832 Court of Chicago were an allegation on the part of the defendants here against the plaintiff for rent, for services rendered and for moneys advanced and for certain printing bills, Carco bills.

Now, if your Honor please, at the time this matter came up on February 8th we had a day-long trial. Subsequent to that, about 3:00 or 4:00 o'clock that afternoon, we went into Judge Koza's chambers and entered into a compromise settlement of those issues.

Now, that particular matter is settled.

By Mr. Mullin: Has that been consummated?

By Mr. Cohen: The case has been dismissed, and there was a motion entered and continued until Friday in regard to that particular case. Yesterday I was unable to go before Judge Koza at 2:00 o'clock, and therefore that is all I can tell the Court.

833 By Mr. Mullin: Your Honor, I was not in that case. I did attend during the trial or part of the trial, but I don't know what happened subsequently. I do know there was an attempt to settle it. I do know also there has been no settlement or exchange of release for moneys.

By the Court: Well, proceed.

By Mr. Mullin: Q. Proceed.

By Mr. Cohen: If your Honor please, I will plead this matter has been decided in that case, and I certainly think it is imposing upon this Court and confusing all the issues to have any material that is concerned in that matter heard in this case.

By the Court: Your opponent just told me it has been settled. Overruled.

By Mr. Cohen: It has been settled.

By the Court: Overruled.

By Mr. Mullin: Q. Go ahead, Miss Siegel.

By the Witness: What was the question?

(Thereupon the question was read by the Reporter as follows: Q. "Do you recall what the total was?")

834 By the Witness: A. $1500.00, and I don't remember the exact amount, but I believe it was $1569.00 or something.

By Mr. Mullin: Q. What was that?

A. About $1569.00 or 79, I don't remember the exact last two figures, but it was 1500 and some odd dollars.

Q. You say the original was tendered to the plaintiff, the original of this accounting sheet, is that true?

A. As far as I know, yes.

Q. Do you have a copy or do the defendants have a copy of that?

A. Yes. You mean the large graph sheet, or are you referring to each order?

• • • •

836 By Mr. Cohen: Well, let me advise the Court that my clients advise me none was ever tendered to them, and therefore they do not have one.

By the Court: Put them on the stand and let them testify.

By Mr. Cohen: At this moment?

By the Court: Yes, let them swear to it. They are ordered to produce the document.

By Mr. Cohen: Mr. Fullman, will you stand before the Court here?

837 (Whereupon Mr. Sidney B. Fullman approached the bench.)

By Mr. Cohen: Mr. Fullman, you have been sworn here previous to this time?

By Mr. Sidney B. Fullman: I have.

By Mr. Cohen: You have heard the testimony that Rose Siegel has given that a graph sheet was tendered to the City Messenger of Hollywood, doing business as City Messenger Air Express?

By Mr. Sidney B. Fullman: I heard that testimony.

By Mr. Cohen: Was such a document ever tendered to you or any officer of the plaintiff corporation?

By Mr. Sidney B. Fullman: Definitely not.

By Mr. Cohen: You state this of your own knowledge?

By Mr. Sidney B. Fullman: That is one of the reasons I instituted the lawsuit, because they wouldn't give me a statement of charges, of what was expended or what
838 I owed them. They would not give me any information

at all, and it led to my suspicions of diversion and something wrong.

By Mr. Cohen: Is there anything further?

By Mr. Mullin: Yes.

Was there any document whatsoever submitted to you at that time, stating the amount that was due to the defendants in this case from you?

By Mr. Sidney B. Fullman: In April of 1956, long after this litigation started, I received a Recordak film, a Recordak film of alleged charges and billings that City Bonded Messenger & Trucking Service alleged I owed them. This was the only time I ever received any billing at all.

By Mr. Mullin: What was the amount or total of that?

By Mr. Cohen: Well, counsel, I think you should ask first whether or not there was any total.

By the Court: Well, produce the paper, like I said.

By Mr. Cohen: Mr. Sidney Fullman has a Recordak
839 film, and he has broken down into months and clipped together facsimiles of material appearing in the Recordak film. The tapes and other papers are his own work sheets or work material.

Is that correct, Mr. Fullman?

By Mr. Sidney B. Fullman: That is correct.

By Mr. Mullin: Based on those tapes you ran off, what was the total of all those bills?

By Mr. Cohen: If your Honor please, I object to this line of questioning, for only one reason, sir; that the alleged amount due and owing was litigated in the Municipal Court of Chicago.

By the Court: Overruled.

840 By Mr. Sidney B. Fullman: Can I answer the question, your Honor?

By the Court: Yes, answer the question.

By Mr. Sidney B. Fullman: All right.

By Mr. Mullin: Yes.

By Mr. Sidney B. Fullman: The total, according to our figures, came to approximately $560.00. According to the figures presented by the defendant City Bonded Messenger & Trucking Company, who were the plaintiffs in the other action, the Municipal Court action, their figures came to approximately $1500.00.

By the Witness: May I clarify that?

By the Court: What?

By the Witness: May I clarify that?

By the Court: Yes.

By the Witness: The $500.00 was delivery charges City Bonded Messenger Service, and the other charges were advances we made for freight shipments.

* * *

841 By Mr. Cohen: What is the ruling?

By the Court: You produce that.

By Mr. Cohen: We have produced the Recordak film.

By the Court: Where does the Recordak film come from?

By Mr. Sidney B. Fullman: Can I answer that?

By the Court: Yes.

By Mr. Sidney B. Fullman: This was sent to me by mail from the Eastman Kodak on or about April 15, 1956, and was produced at the behest of counsel for the defendant in this action, because we had requested it, simply insisted upon it, and they sent it to us, and we received it in the mail in April, 1956.

By the Court: Very well.

The $500.00 was what, Madam?

By the Witness: For the messenger delivery service of City Bonded Messenger Service performed in the 842 ground operation of the air forwarding.

By the Court: What was the rest of it?

By the Witness: Advances we made.

By the Court: What were the other amounts?

By the Witness: Beg pardon?

By the Court: What were the other amounts?

By the Witness: The balance was $500.00 and I don't know the exact amount, but the other would be a thousand dollars, and that is substantiated by receipts from the different companies.

By the Court: The $500.00 plus was charges for messenger service?

By the Witness: For six months.

By the Court: By City Bonded Messenger?

By the Witness: Yes, sir.

By the Court: And the thousand dollars?

By the Witness: Advances made.

By the Court: Advances made by City Bonded Messenger?

By the Witness: That's right.

By the Court: On behalf of?

By the Witness: Air freight forwarding.

By the Court: Air freight forwarding?

843 By the Witness: Yes, sir.

* * *

By Mr. Mullin: I move to introduce into evidence the Recordak film marked Defendants' Exhibit 54 for identification, representing these bills and charges.

By the Court: Any objection?

By Mr. Cohen: Yes, I object.

By the Court: What is the ground of your objection?

By Mr. Cohen: The sum and substance of this film is to show the bills and charges and other matters which relate to the case in the Municipal Court of Chicago, which was settled, and in which a release exists.

844 By the Court: You have not pleaded any release?

By Mr. Cohen: Yes, I am pleading the release.

By the Court: That is no way to plead a release. Objection overruled.

By Mr. Mullin: It may be received, your Honor?

By the Court: It may be received.

(Said film, so offered and received in evidence, was marked Defendants' Exhibit 54.)

By Mr. Mullin:

Q. You testified that the defendant was doing business with Emery Air Freight Forwarders. Do you know how much revenue is received from Emery Air Freight Forwarders?

A. No, I do not, sir.

Q. You do not?

A. No.

845 *Cross Examination by Mr. Cohen.*

Elliott was a visitor at my home. I wouldn't know whether he visited me and stayed at my house during the year of either '46, '47 or '48. They did visit, but you are going back quite a few years, and they would stop by whenever they were traveling back and forth and coming into Chicago. I remember one visit where they stayed quite a few weeks in the summer. At that time I wasn't working. The one I think you are referring to is 1947, and I was in Florida at the time. He did not stay at my home.

846 Elliott did not stay at my house. I did not testify Elliott stayed at my house. He visited me. I believe he stayed at the Shoreham. This was in early December, 1954. We both lived north and he drove north and I drove with him. I think Sidney Fullman came to the office of City Bonded Messenger the first time in the early part of January, 1955. I wouldn't have any way of knowing whether he was there before that.

847 I wasn't in the office at all times. I was in the office on the 5th or 6th of January, 1955. He was in the office on the 5th and 6th. He wasn't thrown out bodily. He was not thrown out at all. The graph sheet

that I prepared was not personally presented to Mr.
848 Fullman by me. I was the bookkeeper and was situated at 193 North LaSalle during the period of May, 1954, to January of 1955. I had occasion to answer telephones during that period of time. I had occasion to answer the telephone number of Randolph 6-2391. City
849 Bonded Messenger is now handling Emery Air Freight. They are handling other air freight accounts. I don't know all the names. I am no longer bookkeeper there. I am at another office. I do not know when they started handling these other accounts.

850 ABRAHAM BITTMAN, called as a witness on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

851 *Direct Examination by Mr. Mullin.*

My name is Abraham Bittman and I reside at 6015 North Richmond Street, Chicago, Illinois. I am a certified public accountant. I am a member of the Illinois bar. I have been practicing as a C.P.A. since January of 1952. I have been a member of the Illinois bar since January of 1955. I
852 am acquainted with the defendants in this lawsuit. I have no relationship to the defendants in this lawsuit. I am employed by the defendants as their accountant. They are one of my accounts. I have been their accountant since June of 1955. I have had occasion to examine the books and records of the defendant. The books of the corporation are kept on a fiscal year ending September 30th of
853 1956. The gross volume during the year of 1956 for this defendant would be $345,301.00. That is the gross sales during the year 1956, the fiscal year
855 ending September. I examined the books and records. I prepared a tax return for the fiscal year September 30, 1955. The gross sales for that year were $299,000. The

books and records that I examined go back to 1952. I examined the retained copies of the partnership income tax returns going back to 1946. The gross total sales since 1946, in the aggregate is $1,610,000, that is from 1946
856 through September 30, 1956. I do not recall seeing an account there involving the Emery Air Freight. The amount expended by the defendants in advertising during the fiscal year ending September 30, 1956, I would say would be approximately $7,000.00, and during the year ending 1955 about $5,500, and during the year ending 1954 about the same amount $5,500.00.

859 WILLARD GILBERT, called as a witness on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Mullin.

860 My name is Willard Gilbert. My home address is 2352 East 72nd Street, Chicago, Illinois. I am a sales manager for City Bonded Messenger & Trucking Service. I have been sales manager for the defendant corporation for four years. I am acquainted with the accounts and services of the defendant corporation. I am acquainted with the plaintiff in this case. I was engaged in obtaining sales during the period of May, 1954, to January,
861 1955, for City Bonded Messenger Service and City Air Express. We were soliciting the City Air Express business as of May, 1954 up until January, 1955, and we were introducing the air express business to all, most all of our accounts that were interested in handling air freight. We also left display cards explaining the different services on the City Air Express at that time, with the various accounts that we contacted. I personally contacted these accounts. Mr. Elliott Fullman also accompanied me. I had taken him around to various ac-

counts, on City Air Express only. In the company of
862 Mr. Elliott Fullman I contacted Avon Products, the Kraft Foods, Pfizer Pharmaceutical, CBS Broadcasting Company and there are probably others, but I just can't remember at this time. Prior to my contacting them during this period, they were my customers. At the present time, we have Kraft Foods on messenger service, occasional messenger service from Kraft Foods, and we have some of the CBS messenger service, and that's about all, and I mentioned all the services we are
863 getting at this time out of those companies. We are still getting occasional messenger service from Kraft Foods at this time. Prior to this time, I would use the same word to characterize the type of service. It was occasional deliveries on messenger service, before May, 1954. It is still about the same, occasional. As to the others,
864 Avon has moved out of town. They have moved to Morton Grove. We are not getting any business on messenger service from Avon since they moved to Morton Grove. We are not getting Charles Pfizer either. It was all air express at the time we had contact with them. I am familiar with the account of Emery Air Freight. Regarding the Emery Air Freight account, Mr. Mansfield, about July of '54, had made some trips out to Emery, to secure their air freight business. He had made several trips out there, probably in July and August, and then
865 it was turned over to me for further follow up. I had contacted Emery in February of 1955 and told the Emery Air Freight Company that we were interested in taking over the entire operation of the air freight for city delivery, with pickup and delivery, and we were interested in that because they had five rental trucks going and we knew our operation could fit in very nicely into
866 their setup. I went out to Emery. I had phoned Mr.

Mansfield in February and asked him if he would come out to the office of the Emery Air Freight and discuss it further. He had done so and we had talked to Mr. Bruin and Mr. Williams of the Emery Air Freight. Due to the fact that we were handling another air freight's business, which was City Air Express, they weren't fully convinced that we could handle that operation to their satisfaction. They had told us that they had discontinued that type of operation. We had another meeting with Mr. Williams, Mr. Bruin and Mr. Connors and, in March of 1955, we started operations with Emery. They told us then, "O.K., we are going to feel you out and see how you can go with us and see what type of service you can render and if we find that you are capable of handling our deliveries like we want them, we will eventually turn over our entire operation to you."

867 During the conversation, we mentioned putting in a dispatcher to dispatch the air freight. It was agreed then that they would carry on with our company to take on their deliveries and the pickup and deliveries of their freight and give us a portion of that business, which averaged between three and five hundred dollars

868 per week. That represents these pickup and delivery services for Emery only. There are no payouts of any kind, just pickups and deliveries for Emery freight. We are not required to make any payouts for them. I am familiar with the accounts.

We have an account with a governmental agency. We have the Internal Revenue Service. We are handling deliveries for them. We pick up whatever information they have at the various offices of the Internal Revenue and bring it in to 22 West Madison Street, the general office headquarters. It is going on its second year, as I recall,

that we have been doing that. I am almost sure
869 it is over a year and it is going into its second year.
We have an agreement and a contract.

By Mr. Mullin: The defendants rest, Your Honor. At this time, though, I would like to make a motion to be permitted to amend our complaint and counterclaims to conform with the proofs here.

* * *

870 By the Court: What do you have in mind?

By Mr. Mullin: I think we have made out a case of breach of contract. We have a count for fraud and deceit but not for breach of contract, and I would like to put in such count.

By the Court: You may have leave.

By Mr. Mullin: Thank you, Your Honor.

By the Court: When will you do that?

By Mr. Mullin: I will have that tomorrow.

871 A. J. SCHUDE, called as a witness herein on behalf of the plaintiff, in rebuttal, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Cohen.

872 My name is A. J. Schude. My first name is Andrew. My middle initial is "J" for John. I reside at 2934 North Harding, Chicago, Illinois. I am a sales manager for C. H. Hansen Company. They are situated at 303 west Erie Street. I have been employed by that com-
873 pany for 35 years. I have served in the capacity as sales manager for 25 years. I am not too familiar with the defendant corporation, City Bonded Messenger & Trucking Service; only that it is one of our accounts, is all. We manufacture a great lot of things. We make

name plates, rubber stamps, steel dies, badges, and so forth. We have taken an order from the defendant, City Bonded Messenger & Trucking Service. I guess it was in 1954. I have the books and records of my company
874 right here. This is an order dated June 17, 1954, on the letterhead of City Bonded Messenger & Truck-
875 ing Service. It is signed by Irving Mansfield. According to this order, we had made 50 badges. The design of the badge was our own design and their copy. That is, what I mean by that, their pattern—it has been lettered "City Bonded Messenger & Trucking Service." Defendants' Exhibit 41, a badge saying "City Bonded Messenger & Trucking Service", is our design. It looks
876 like our work. It is our design badge, in other words, the cutout. This is a stock pattern of ours. The lettering has been produced by us as per copy herewith. That is part of the production of the badge. So far as I can see, it is identical with the badge, with the exception that there is no number on that. That was the first order in 1954. The defendant corporation reordered 26 later in 1956. We have no record of the defendant corporation reorder-
877 ing any badges after that. We did not, not that I know of, produce any badges prior to the first order.

Cross-Examination by Mr. Silverman.

I would say that Defendants' Exhibit 41 is a badge manufactured by our company. I am not making a comparison between papers in my hand and the badge. I took this order and I know what I made. I would
878 say this is our badge. It could be possible that there were other badges made by other companies. I can't prove the identification on that badge. There is more than one badge manufacturer in the country. But I would say that this is our badge. No, it is not based upon a deduction upon the papers I have and my recollection of the

transaction. I still have another little drawing here that shows you the actual size badge. Someone else could have made the identical badge. Just like we can make you coins, the same as they do in Washington. We could do that right here in Chicago in our plant. There isn't anything that you can't reproduce. There is no identifying mark on that badge to tell who made it. The records
879 I hold in my hand came from C. H. Hansen Company and there are invoices on them right here. We have a bookkeeper. We have a filing clerk. We have files. Our office makes all the entries in the books and records. I took these out of our files. I personally took them out of the files. I was not in charge of these records, but I was in charge of this order when I first made the first lot. We have the copy that was on the badge or badges that our company made right here. We prepared that. We
880 prepared this sketch from the copy we got from City Bonded, whoever they are.

881 *Redirect Examination by Mr. Cohen.*

In the last order we made for the defendant corporation contained badges numbered from 100 to 125. The date of that order was April 2nd, I believe, 1956.

BENJAMIN FULLMAN, called as a witness herein on behalf of the plaintiff, in rebuttal, having been previously duly sworn, resumed the stand and testified further as follows:

882 *Direct Examination by Mr. Cohen.*

883 I didn't have a face-to-face conference with Mr. Irving Mansfield on December 29, 1954. I didn't have any face-to-face conference with him on any day other than that in Los Angeles, California. From the time I saw him in September, I didn't see him again until January when I came to Chicago.

I have received Plaintiff's Exhibit 24 which is a let-
884 ter dated 12-29-54 addressed to "Dear Ben" and signed "Yours, Irving," on the letterhead of City Bonded Messenger & Trucking Service Inc. I have sent Plaintiff's Exhibit 25 which is a letter dated January 3, 1955, addressed "Dear Irving" in typewriting and signed just "Sincerely". I received Plaintiff's Exhibit 26 which is a letter dated January 6th on the letterhead of City Bonded Messenger & Trucking Service, Inc., addressed "Dear Ben" and signed on the reverse side "Yours, Irving." I received those two letters and mailed the original of Plaintiff's Exhibit 25 on or about the date that they bear. I had just returned from a vacation over New Year's and opened up my mail and there was this letter from Irving and it was dated on the 29th. At least, the date of the letter was the 29th. So, I sat down and wrote him a reply. The date I got it was January 3rd and
885 I wrote him a reply right away. In reply to the letter I wrote, he wrote me another a couple of days later, dated January 6th. I was in Los Angeles at the time. Mr. Irving Mansfield wasn't there at this time, so far as I was concerned. I didn't see him. I did not play a tape record-
ing to Mr. Mansfield in my office in Los Angeles on
886 December 29, 1954. There was a meeting between Mr. Irving Mansfield and myself during the month of September, 1954, in Los Angeles, California. It must have been the first or second week of the month. I don't know the exact date. It was around the Jewish holiday, between Labor Day and the Jewish holidays; and I know he told me at that time he was going to worship, so I know it was on that occasion. It was the result of a dis-
887 cussion we were having on the possibility of this merger, and Mr. Mansfield informed me, "I am not interested in making any investment in City Messenger of Hollywood by turning my business into yours as a merg-

er. I will only be interested in buying a half interest in City Messenger Air Express. How much is it worth?" I said, "That is a pretty tough figure to set up, what the value of the permit is, because there is no definite value, but if you ask me a figure, it is worth $100,000.00." He spoke, "That is ridiculous. How much did you invest in getting this permit?" Actually we invested $12,500.00 in expense money. Mr. Mansfield: "That's all we would be interested in investing, and there is no possibility of an investment," and Mr. Mansfield went on his way, and that is the last I saw of him until January. He continued serving us as a pickup and delivery agent all during this time interval.

I know who the owners of the stock of City
888 Messenger of Hollywood are. Elliott Fullman has
20 shares; Sidney Fullman has 20 shares; Norvin Fullman has 20 shares; Beatrice N. Fullman has 39 shares, and I have one share. That is all the shares there are.

889 Plaintiff's Exhibits 24 and 26 received in evidence.

890 *Cross Examination by Mr. Mullin.*

I recall the existence of a tape recording of conversations, either telephone or direct, that I had with my sons. I don't think that tape recording is in existence today. It was made sometime in 1954. It was taped off a telephone conversation in New York. I believe Elliott was involved in the conversation which was recorded on tape. I don't
think there were any other sons involved. I don't
891 remember a personal, face-to-face conversation with Mr. Mansfield in Los Angeles on approximately November 9th or 10th of 1954. As a matter of fact, as I said before, I saw him in September and then the next time I saw him was in October, or rather, January, when I came here. The only meeting Mr. Irving Mansfield and his

brother, Elias Mansfield, had was one time in Septem-
892 ber. I talked to his brother several times on the tele-
phone. I don't recall any other personal meeting after that date. The tape recording was not played at a meeting. I played it in the telephone. That tape recording can be plugged in the telephone and played and you can listen to the telephone and hear it. He called me and asked what was going on and I said, "Listen, I can save you trouble. You can listen to this on the telephone." That was sometime in October, maybe the first
week. It was two or three weeks after Mr. Mans-
893 field left. I am referring now to the meeting I had
894 with him, in September, 1954. As to the tape recording that I played to Mr. Mansfield, Elliott had called me and asked what the status of these negotiations were, and I informed him that Mr. Mansfield is not interested in buying, rather, merging the two companies, but he wants to buy a half interest in the City Messenger Air Express, and I told him he wanted to know the value of the company, what it was, and I told him it was hard to state, but at least the permit was worth $100,000.00, and he informed me, "What did Mr. Mansfield say about it?" and I said, "He said it was ridiculous, that he
895 wouldn't make such an investment: that the only investment he would make or that he would be willing to make would be a small investment in City Messenger Air Express where he would get half of it and the rest of the group would get the other half. Elliott replied, "We wouldn't care about that, not interested unless he can come up with something better than that. Forget about it." The whole conversation took two or three minutes.

897 SIDNEY B. FULLMAN, called as a witness on behalf of the plaintiff, in rebuttal, having been previously duly sworn and examined, testified further as follows:

898 *Direct Examination by Mr. Cohen.*

Our air freight pickup and delivery drivers use a badge to identify them. We first started using this badge on about the 1st of October of 1956. Our company in the City of Chicago did not use badges prior to that date.

899 Plaintiff's Exhibit 27, which purports to be a badge, in essence being wings with a circle, bearing the imprint of a plane and a terminal and bearing the letters "CMAX Nationwide Air Freight," is the badge that our company has its employees wear. That is the badge they have used since October, 1956. It is placed on the cap just above the visor. All our pickup and delivery drivers wear that particular badge to identify them. The employees in the City of Chicago have never used any

900 other type of badges or emblems.

Plaintiff's Exhibit 27 received in evidence.

901 *Cross Examination by Mr. Mullin.*

As I recall, we began to use this badge in October, 1956. Prior to that, the badge was never worn by our employees. There was no other identification whatsoever. One of the vehicles operated by Mr. Baker has the lettering "CMAX". That's all it says on it. The word "City" appears

902 on no vehicles, clothing or any identification. That is the same badge used by our pickup and delivery drivers. Our company does operate a messenger service in New York and California. The messengers in those cities don't wear any badges. They do wear identifica-

903 tion. They wear a celluloid card affair that identifies the company for which they work. It would be similar

in looks to a defense plant badge. It pins on their clothing. The word "City" written in script does appear thereon. I couldn't tell you the material of which it is made. I don't know what particular metal this is made of. I would say the coloring of "CMAX nationwide air freight" is tan. It looks like tan to me.

The insignia, the little messenger boy and the word "City" in script, appearing on Defendants' Exhibit
904 41 comprising the badge used by the defendant, does not appear on any of our identification in Chicago that the messengers wear.

Redirect Examination by Mr. Cohen.

By identification I mean the badge.

By Mr. Cohen: The plaintiff rests.

[March 1, 1957]

909 IRVING MANSFIELD, called as a witness on behalf of the defendants, having been previously duly sworn, resumed the stand and testified further as follows:

Direct Examination by Mr. Mullin.

911 I am Irving Mansfield. I have a check in my hand dated December 27, 1955, made out to the American Air Lines for $239.91. It represents a trip I took to Los Angeles to see the Rose Bowl game in 1955. That is Defendants' Exhibit 55. The American Air Lines' endorsement, with my ticket number and my address, 5210 Blackstone, and my telephone number appear on the back. This evidently is what I was confused with when I said I was out in Los Angeles in 1954. It was in '55, and evidently when talking to my brother we were confused as to this being the date of 1954. In reality it was 1955. I am referring to the Rose Bowl game which took place
912 in January, 1956, and I left the following day. This is a check dated October 14, 1954, made out to the

United Air Lines for $239.91, and represents a round trip to Los Angeles. They have their endorsement on the back of it, "United Air Lines" with flight 731 to Los Angeles on the 15th of October, 1954. That is the time that we were confused with the time I was out there in Los Angeles and visited Ben at his office and heard the tape recording. Here is a charge from the Diners' Club, or charge from the Ambassador Hotel, October 17, 1954, for $54.00. This is a charge for the House of Murphy in Los Angeles, and another for the Barclay also in
913 Los Angeles, dated October, 1954, and the first part of November. This is a check dated in October, 1954, which I made out to myself for $500.00 for this trip, and it was cashed by my brother, and bears the stamp of the Bank of Los Angeles and the Federal Reserve. The date of the second meeting with Ben Fullman, at which time my brother and I heard this tape recording, would have
914 to be subsequent to October 15th, to around November 1, when I was there. I was in error when I placed it at the end of December or first of January.

Defendants' Exhibits 54, 55, 56 and 57 received in evidence.

942 CERTIFICATE

I hereby certify that the above and foregoing transcript comprising pages numbered consecutively from 1 to 941 is a full, true and accurate transcript of the original shorthand notes of all the proceedings had upon the hearing of the above-entitled cause, beginning on February 15, 1957 and concluding on March 14, 1957, before the Honorable John P. Barnes, Chief Justice of said Court.

s/ Roy E. Fuller
Official Court Reporter
United States District Court
Northern District of Illinois

May 16, 1957.

IMPORTANT { YOU ARE MAKING THE ORIGINAL AND 5 CARBON COPIES

E-Z-OUT
REG. U. S. PAT. OFF.

BEAR DOWN AND **PRINT** ALL CHARACTERS.

CITY MESSENGER OF HOLLYWOOD INC. D/B/A

CITY MESSENGER AIR EXPRESS

FORWARDER AIRBILL NON NEGOTIABLE

STATION

It is mutually agreed that the goods herein described are accepted in apparent good order (except as noted) for transportation as specified herein, subject to governing rules, classifications and tariffs, in effect as of the date hereof, which are filed in accordance with law. Said rules, classifications and tariffs, copies of which are available for inspection, are hereby incorporated into and made part of this contract.

STAR SPECIAL ☐

DATE CMAX No. 09505

FROM

CONSIGNOR

STREET ADDRESS CITY

ACCOUNT OF DEPT. OR ORDER NO.

SIGNED FOR CONSIGNOR PER

TO

CONSIGNEE

STREET ADDRESS

CITY COUNTY STATE

CHARGES (CHECK ONE) COLLECT ☐ PREPAID ☐

NO. PCS.	DESCRIPTION	WEIGHT	RATE	SUMMARY OF CHARGES	PREPAID CHARGES		COLLECT CHARGES	
				WEIGHT RATE CHARGES				
				ADVANCES				
				EXCESS VALUE TRANSP. CHARGES				
				SUB TOTAL				
				TRANSPORTATION TAX				
				SHIPPER'S C.O.D.	X X	XX		
				C. O. D. FEE				
				TOTAL CHARGES				

DIMENSIONS ____ X ____ X ____ IN. ____ CU. IN. DIMENSIONAL WEIGHT

DECLARED VALUE $

PICKUP ADDRESS MAY 9 - 1957 TIME

A/L A/B NO. DEL'D.

AT ..... O'CLOCK 55673

RECEIVED BY ROY H. JOHNSON, CLERK

CITY MESSENGER AIR EXPRESS

THIS IS YOUR INVOICE - NO STATEMENT WILL BE SENT

FILED

Plaintiff's Exhibit 1.

PLAINTIFF'S EXHIBIT 1.

198

PLAINTIFF'S EXHIBIT 7.

Civil Aeronautics Board
Washington 25

Letter of Registration No. 163
Air Freight Forwarder

City Messenger of Hollywood, Inc.
d/b/a City Messenger Air Express
1414 Cole Place
Los Angeles 28, California

is hereby acknowledged to have duly registered with the Civil Aeronautics Board as an Air Freight Forwarder under the provisions of Part 296 of the Economic Regulations, relating to indirect air transportation of property only between places in the continental United States.

This Letter of Registration is not transferable and may be suspended, revoked or terminated in accordance with pertinent provisions of Part 296 of the Economic Regulations.

This is not a certificate of public convenience and necessity and is merely evidence of registration.

Issued: May 21, 1954

Effective: May 22, 1954

(Seal)

M. C. Mulligan
Secretary

PLAINTIFF'S EXHIBIT 10.

STATE OF CALIFORNIA
Office of the
Secretary of State

I, Frank M. Jordan, Secretary of State of the State of California, hereby certify:

That I have compared the annexed transcript with the Record on file in my office, of which it purports to be a copy, and that the same is a full, true and correct copy thereof.

In Witness Whereof, I hereunto set my hand and affix the Great Seal of the State of California, (Seal) at Sacramento, this 19th day of February, 1951.

Frank M. Jordan
Secretary of State
By Chris J. Hagert
Deputy

Articles of Incorporation
of
City Messenger of Hollywood

Know All Men by These Presents:

That we, the undersigned, all of whom are residents of the State of California, have this day voluntarily associated ourselves together for the purpose of forming a corporation under the laws of the State of California, and we do hereby certify as follows:

First: That the name of the corporation shall be: City Messenger of Hollywood.

Second: That the purposes for which this corporation is formed are as follows:

(a) That said corporation shall primarily engage in a general messenger and delivery service.

(b) To purchase, take and lease, exchange or otherwise acquire any real or personal property, rights or privileges

convenient for any of the purposes of this business, and to purchase or acquire anything necessary or useful for the conduct of the business as above specified.

(c) To borrow or raise money for any purposes of the company and to secure the same and interest, or for any other purpose, to mortgage all or any part of the property corporeal or incorporeal rights or franchises of this company now owned or hereafter acquired, and to create, issue, draw and accept and negotiate bonds and mortgages, bills of exchange, promissory notes or other obligations or negotiable instruments.

(d) And further to do and perform and cause to be done or performed such, any and all of the acts and things above enumerated and any and all other acts and things insofar as the same may be incidental to or included in any or all of the general powers given, always provided on the grant of the foregoing enumerated powers is upon the express condition precedent, that the various powers as enumerated shall be exercised by the said company only in case the same are authorized to be exercised by the acts above recited under which said company is organized and the same shall be exercised by said company only in the manner and to the extent that the same may be authorized under the said acts above recited under which it was organized.

(e) To enter into, make, perform and carry out contracts of every kind and to engage in any lawful business without limitation or otherwise with any person, firm, association or corporation.

Third: That the principal office for the transaction of business of the corporation shall be 6512 Selma Avenue, Hollywood, Los Angeles County, California, or in such other place or places within said County as may be designated.

Fourth: That this corporation shall exist perpetually or until such time as it is dissolved voluntarily or by involuntary action.

Fifth: That the number of directors of this corporation shall be five and the number hereby fixed shall constitute the authorized number of directors until changed by amendment to the Articles of Incorporation, or by a by-law duly adopted by the shareholders, but in no event shall the number of directors of this corporation be less than three; that the names and addresses of the persons who are hereby appointed to act as the first directors and until their successors are elected are as follows:

Names	*Addresses*
Sidney Fullman	11160 Valley Spring Lane, North Hollywood, Calif.
Beatrice M. Fullman	11160 Valley Spring Lane, No. Hollywood, Calif.
Sam Chess	6512 Selma Avenue Hollywood, California
Norvin Fullman	11160 Valley Spring Lane, No. Hollywood, Calif.
Elliot Fullman	11160 Valley Spring Lane, No. Hollywood, Calif.

Sixth: This corporation is authorized to issue only one class of stock, to wit: Common of the total number of 100 shares with the aggregate par value of $10,000.00, the par value being $100.00 per share.

Sidney Fullman
Sam Chess
Norvin Fullman
Elliot Fullman
Beatrice M. Fullman

County of Los Angeles)
State of California) ss:

On this 29th day of December, 1950, before me, the undersigned, a Notary Public in and for the said County and State, personally appeared Sidney Fullman, Sam Chess, Norvin Fullman, Elliot Fullman and Beatrice M. Fullman, known to me to be the persons whose names are subscribed to the within instrument and acknowledged to me that they executed the same.

In Witness Whereof, I have hereunto set my hand, and affixed my official seal the day and year first above written.

Max L. Grossman
Notary Public in and for said County and State.

(Notarial Seal)

DEFENDANTS' EXHIBIT 42.

THE ONLY NATIONAL MESSENGER SERVICE IN THE U.S.A.

City
BONDED
MESSENGER AND
TRUCKING SERVICE
The Better Standard of Messenger Service

RAndolph 6-6001

IN THE HEART OF THE LOOP

CHICAGO	NEW YORK	HOLLYWOOD	LOS ANGELES	BEVERLY HILLS
RAndolph 6-6001	MUrry Hill 5-1166	HO 4-1188	MU 8191	CR 50183

100 FINDINGS OF FACTS, CONCLUSIONS OF LAW AND FINAL JUDGMENT ORDER.

[Entered March 14, 1957]

Findings of Fact:

1. This is a suit for unfair competition brought by the Plaintiff, City Messenger of Hollywood, Inc., doing business under the tradename of City Messenger Air express against three corporate defendants and two individual defendants, as follows:

> City Bonded Messenger and Trucking Service, Inc., The Illinois Bell Telephone Company, The Reuben H. Donnelley Corporation, Irving Mansfield and Nadine Mansfield,

2. Defendants, City Bonded Messenger and Trucking Service Inc., Irving Mansfield and Nadine Mansfield,

101 counterclaimed for unfair competition, service mark infringement, fraud and deceit and breach of contract.

3. Subsequent to the filing of the complaint but prior to the trial of the issues, namely on October 5, 1956, Defendant, City Bonded Messenger and Trucking Service, Inc., filed articles of amendment changing its name to City Bonded Messenger Service and an additional new corporation City Bonded Trucking Company, Inc., was incorporated, said new corporation and said Defendant, now by change of name City Bonded Messenger Service, were

substituted for Defendant-Counter-Claimant, City Bonded Messenger and Trucking Service, Inc.

3. Defendants, Irving Mansfield and Nadine Mansfield, acted solely within the scope of their employment as employees and by motion were dismissed as Defendants from this case.

4. Defendants, Illinois Bell Telephone Company and the Reuben H. Donnelley Corporation have counter-claimed and cross-claimed for declaratory judgment, seeking an order from the Court concerning listings of the Plaintiff and the Defendants in both the Chicago Alphabetical telephone directory and the Chicago Classified telephone directory.

5. On April 29, 1955, the Court entered an order that both Plaintiff and Defendant be listed only under their respective corporate names and not under any assumed names, pending the further trial of the issues.

102 6. This Court has jurisdiction of the subject matter and parties involved.

7. Plaintiff, City Messenger of Hollywood, Inc., is a California Corporation doing business in the State of Illinois and having an office at 845 South Wabash Avenue, Chicago, Illinois. Defendants, City Bonded Messenger Service and City Bonded Trucking Company, Inc. are Illinois Corporations having their principal offices at 193 North LaSalle Street, Chicago, Illinois.

8. Defendants, City Bonded Messenger Service and City Bonded Trucking Company, Inc., and their predecessors in title, namely City Bonded Messenger and Trucking Service, Inc., a corporation, City Bonded Messenger and Trucking Service, a co-partnership comprising Irving Mansfield and Nadine Mansfield, and Irving Mansfield doing business as City Bonded Messenger Service, have continuously, openly and notoriously, since September 1942, engaged in the messenger and trucking business in the Chicago area, including Interstate Commerce

within a 50 mile radius in the State of Indiana under their said tradenames.

9. The tradename and style of the aforementioned Defendants and their predecessors in title are presently and continuously have been, since September, 1942, dominated by the word "City" and the phrases "City Messenger" and "City Bonded Messenger".

103 10. The aforementioned Defendants and their predecessors in title presently are, and for a long time prior to the acts herein complained of, have been the owners and have continuously used in connection with the sale, advertising and rendering of messenger and trucking services in Interstate Commerce, a service mark comprising the word "City" written in script with a caricature messenger boy running through the letter C, the illustration of a speeding automobile positioned above the letter Y and having the word "Bonded" displayed below the word "City".

11. The aforementioned mark was duly registered on the Principal Register in the United States Patent Office on July 26, 1955, Registration No. 609,732 and said Defendants are the legal and equitable owners of said service mark and registration and have the right to sue for infringement thereof.

12. Plaintiff was incorporated in the State of California under the corporate name, City Messenger of Hollywood, Inc., on or about February 19, 1951.

13. Plaintiff failed to establish a chain of title showing any predecessor or use by any predecessor of a tradename or a service mark dominated by the word "City" or the phrases "City Bonded Messenger" or "City Messenger" in the sale, advertising or rendering of any messenger or trucking service prior to the date of its incorporation.

104 14. Modern Delivery Service, a California corporation doing business under the tradenames City Messenger and Express Co., City Transportation Co., and City Messenger, filed a voluntary petition for bankruptcy in the United States District Court, Southern District of California, Central Division on July 15, 1948, was discharged January 9, 1952 with creditors receiving nothing on their claims; some of the principal officers of Plaintiff were principal officers in said Modern Delivery Service and had knowledge of said bankruptcy; and no purchase of any assets were made by Plaintiff or any of its officers from the Trustee in Bankruptcy of said Modern Delivery Service.

15. Plaintiff's corporate name, tradename and/or service marks are dominated by the word "City" and the phrase "City Messenger" and "City Bonded Messenger".

16. Plaintiff uses a service mark in connection with the sale, advertising and rendering of messenger service, trucking service which is substantially identical to Defendant's service mark.

17. Prior to January, 1955 Plaintiff did not maintain an office or any facilities or engage in or render any messenger, trucking or related services in the Chicago area or within a 50 mile radius of the City of Chicago.

18. During the latter part of 1953 and during 1954, Plaintiff through its officers, falsely and fraudulently rep-
105 resented to Defendant-Counter-Claimants that they were to join with it in the ownership and operation of an air freight forwarding business to be known as City Messenger Air Express, with Defendants taking charge of the operations of said business in Chicago, Illinois. Subsequently said Plaintiff, through its said officers continued to falsely and fraudulently represent that said air freight forwarding business had in fact been organized under said name, City Messenger Air Express,

with Defendant-Counter-Claimants as part-owners thereof, and said Plaintiff, through its officers proceeded to act accordingly as though said air freight forwarding business was in fact in existence and as though said Defendant-Counter-Claimants were in fact part-owners thereof, demanding that Defendants fulfill their duties and perform their alleged "part of the bargain".

19. In furtherance of said scheme, Plaintiff on May 18, 1954 falsely notified Defendant-Counter-Claimants that the Civil Aeronautics Board had approved, registered and issued to said new entity, City Messenger Air Express, authorization to engage in the air freight forwarding business, when in fact the authorization had been issued to Plaintiff.

20. Believing the aforementioned representations to be true and relying on the same, Defendant-Counter-Claimants fulfilled their duties and performed their alleged "part of the bargain" by expending large sums of
106 money in "pay-outs" while conducting the air freight forwarding business, extending credit to Plaintiff, guaranteeing the credit of Plaintiff to various suppliers of services used in the air freight forwarding business, including United Air Lines, Inc., Railway Express and Air Express Agency, Inc., and Western Union Co., Inc., by purchasing, at request of Plaintiff, large numbers of printed forms necessary for use in the air freight forwarding business, purchasing and furnishing office supplies, telephone service, office space, terminal facilities, equipment and personnel, circulating and introducing Plaintiff to its customers for the purpose of obtaining business therefrom, furnishing the ground operation portion of the air freight forwarding services, and abstaining from furnishing said ground operation services on behalf of competitive air freight forwarders, including Emery Air Freight Forwarding Co., with consequent loss of revenue therefrom.

21. The aforementioned representations were false and were known by the Plaintiff to be false at the time they were made, and were made with the intent to surreptitiously gain an entry in the Chicago area market, including Defendants' own customers and with the intent of trading on the good will of the Defendants, and indeed trading on said good will by engaging in and rendering messenger, trucking and related services in the Chicago area and between Illinois and Indiana under the confusingly similar tradenames of City Messenger of Hollywood, Inc., City Messenger Air Express and City Bonded Messenger, and using in connection with the sale, advertising and rendering of said services, a service mark substantially identical to Defendants' service mark. The aforementioned representations were further made by Plaintiff with the intent to induce Defendant-Counter-Claimants to act thereon, and with intent to flagrantly deceive and defraud Defendant-Counter-Claimants.

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22. On or about September 7, 1954, Plaintiff entered into an oral contract with Defendant-Counter-Claimants for the sale of an undivided one-half interest of all the assets owned by and in the name of the Plaintiff, including the good will of the business and right to engage in the air freight forwarding business under Civil Aeronautics Board Letter of Registration No. 163, and subsequent thereto, Plaintiff breached said contract and failed and refused to perform the terms of said contract. Defendant-Counter-Claimants have done and performed all things by them to be performed under the terms of said contract.

23. Plaintiff has failed to prove that Defendants at any time diverted any shipments belonging to them to the own use of said Defendants or ever appropriated the proceeds of such shipments to their own use without accounting to the Plaintiff.

108 24. Plaintiff has failed to prove that Defendants ever engaged in unlawful, unfair or deceptive methods of competition against them, including specifically:

a. applying for and obtaining, without the knowledge and consent of the Plaintiff, of any telephone listing of any tradename belonging to Plaintiff, or fraudulently holding themselves out to be air shippers, or being in violation of any of the economic regulations of the Civil Aeronautics Board.

b. engaging in any false, fraudulent or deceptive advertising, including any advertising of City Messenger Air Express, without the consent or approval of the Plaintiff.

c. making any false representation to anybody concerning the credit or financial responsibilty of the Plaintiff.

Plaintiff has failed to prove any allegation of unfair competition alleged in its complaint.

25. Since January, 1955, Plaintiff has engaged in and rendered messenger services including, but not limited to, the ground operation of air freight forwarding services in direct competition with Defendant-Counter-Claimant in the Chicago area and in Interstate Commerce within a radius of 50 miles of the City of Chicago.

109 26. Ground operations of air freight forwarding, namely pickup and delivery to and from the airport, comprises legitimate messenger and trucking services.

27. Prior to the entry of Plaintiff in the Chicago area market, by virtue of the prolonged use, extensive sale and advertising of their services, Defendant-Counter-Claimants' aforementioned service mark had acquired secondary significance in connection with the messenger service in the local area.

28. The tradenames City Messenger of Hollywood, Inc. City Messenger Air Express, City Bonded Messenger and/or any tradename dominated by the word "City" and/or

the phrases "City Messenger" or "City Bonded Messenger", when used in connection with the sale, advertising or rendering of messenger, trucking, air freight forwarding or similar services, are confusingly similar to Defendant-Counter-Claimants' tradenames and the uses thereof by Plaintiff comprises unfair competition with Defendants.

29. Defendants' aforementioned service mark registration No. 609,732 is valid.

30. Plaintiff's use of said service mark in the sale, advertising or rendering of messenger, trucking and air freight forwarding services infringes Defendants' registered service mark.

31. Plaintiff adopted and used the aforementioned tradenames and service mark flagrantly and with full knowledge of Defendant-Counter-Claimants' prior use
110 thereof and with intent to unfairly compete and trade on Defendant-Colnter-Claimants' good will, valuable credit and financial standing and reputation for integrity and fair dealing.

32. Defendant-Counter-Claimants' credit, financial standing and reputation have been injured by Plaintiff's unfair competitive practices.

33. Plaintiff has unfairly diverted revenues for messenger services rightfully belonging to Defendant-Counter-Claimants, including, but not limited to, revenues from a large number of the transactions involving the Admiral Corporation, 3800 West Cortland Street, Chicago, Illinois, as represented in Defendants' exhibit 53, and from transactions with Kuttner & Kuttner, Inc., 646 North Michigan Avenue, Chicago, Illinois.

34. Were it not for the fraud and deceit of Plaintiff and the contract with the Plaintiff, Defendant-Counter-Claimants would have received revenues in the amount of approximately $500.00 per week for the rendering of ground

operation messenger service to Emery Air Freight alone and during the period from May 22, 1954 through February, 1955.

35. The "pay-outs" and messenger services rendered by Defendant-Counter-Claimants on behalf of Plaintiffs during the rendering of air freight forwarding services during the period from May 22, 1954 to January 10, 1955 amounted to $1,526.83.

111 36. Plaintiff is guilty of flagrant, unfair competition and the instituting of this action was vexatious and solely for the purpose of harassing Defendant-Counter-Claimants.

CONCLUSIONS OF LAW

1. This Court has jurisdiction of the subject matter and the parties involved.

2. The service mark in suit is valid and infringed by Plaintiff.

3. Defendants' service mark has acquired secondary significance in the local area as it pertains to messenger service.

4. The granting of a certificate of authority to Plaintiff to engage in the air freight forwarding business under the names City Messenger of Hollywood, Inc., doing business as City Messenger Air Express did not empower Plaintiff to use said names in derogation of the long established prior right of Defendants.

5. The service marks and tradenames of the bankrupt Modern Delivery Service were vested in the trustee in bankruptcy upon the filing of the petition in bankruptcy, and the mere filing of the petition in bankruptcy did not operate as an abandonment of the service mark or the trade names. No sale of said service mark or tradenames having been consummated, the same did not become avail-

able for use and appropriation by Plaintiff until after the discharge in bankruptcy on January 9, 1952.

112 6. The use by Plaintiff of the tradenames City Messenger of Hollywood, City Bonded Messenger and City Messenger Air Express or any tradename dominated by the word "City", the phrases "City Bonded" or "City Messenger", when used in the same area and in connection with the rendering of substantially similar services comprises unfair competition.

7. Plaintiff, who attempted by fraud and deceit to associate itself with Defendant and thereby surreptitiously enter the local market for the purpose of competing with Defendant under tradenames and using a service mark confusingly similar to Defendants' gained no right to use said tradenames and service marks in said area after said association was terminated.

8. Defendants have not engaged in unfair competition with Plaintiff, or diverted or appropriated anything belonging to Plaintiff.

9. Plaintiff has unfairly competed with Defendant-Counter-Claimants.

10. Plaintiff is guilty of fraud and deceit against Defendant-Counter-Claimants.

11. Plaintiff entered into a contract with Defendant-Counter-Claimants and subsequently breached said contract.

12. Plaintiff is guilty of bringing vexatious litigation against Defendants for the purpose of harassing them.

113 JUDGMENT ORDER

After a full and fair consideration of the evidence submitted in this case, It Is Hereby Ordered, Adjudged And Decreed That:

1. Defendants are entitled to an injunction restraining Plaintiff, its officers, agents, servants, employees

and attorneys and all acting under and through them and each of them from directly or indirectly:

a. Using the name City Messenger of Hollywood, Inc., City Messenger Air Express or City Bonded Messenger or any other name containing the word "City" or the phrases "City Bonded Messenger" or "City Messenger" or a service mark identical with or confusingly similar to Defendants' service mark, U. S. Registration No. 609732 Dated July 26, 1955, in connection with the sale, advertising, promotion or rendering of messenger, trucking, air freight forwarding service or any other service similar thereto in the City of Chicago, or within a 50-mile radius therefrom.

b. Doing anything having the effect of representing that Plaintiff's services emanate from Defendants.

2. Defendant-Counter-Claimants are entitled to an accounting of profits and damages and this case shall be and it is hereby referred to Warren E. Carbary, Esq., a Master in Chancery of this court, for determination of:

a. Defendant-Counter-Claimants' damages.

b. Plaintiff's profits.

114 3. Defendant-Counter-Claimants are entitled to punitive damages and an award of treble profits and damages.

4. Defendant-Counter-Claimants are entitled to an award of damages for breach of contract and fraud and deceit in the amount to be determined by the Master heretofore appointed.

5. Defendant-Counter-Claimants are entitled to recover the sum of $1526.83 in repayment for services

rendered and advances made on behalf of Plaintiff by Defendants.

6. Defendant-Counter-Claimants are entitled to an award of costs and disbursements against Plaintiff.
7. Defendant-Counter-Claimants are entitled to recover their attorneys fees from Plaintiff.

IT IS SO ORDERED

United States District Judge
/s/ John P. Barnes

Chicago, Illinois
Date: March 14, 1957

123 NOTICE OF APPEAL

Notice is hereby given that City Messenger of Hollywood, Inc., a California corporation, doing business under the tradename of City Messenger Air Express, plaintiff above named, hereby appeals to the United States Court of Appeals for the Seventh Circuit from the final judgment entered in this action on March 14, 1957.

Normand Cohen,
Attorney for Appellant City Messenger of Hollywood, Inc., a California corporation, doing business under the tradename of City Messenger Air Express, 188 West Randolph Street, Chicago 1, Illinois.

Harry G. Fins,
Of Counsel.

163 United States of America,
Northern District of Illinois—ss.

I, Roy H. Johnson, Clerk of the United States District Court for the Northern District of Illinois do hereby certify that the annexed and foregoing are the original papers constituting the record on appeal in the cause entitled: City Messenger of Hollywood, Inc., a California corporation, doing business under the tradename of City Messenger Air Express, Plaintiff *vs.* City Bonded Messenger Service, Inc., by change of name from City Bonded Messenger and Trucking Service, Inc., an Illinois corporation, et al., Defendants, No. 55 C 575, as follows:

Complaint filed April 19, 1955

Answer and Counterclaim and Cross Claim of Illinois Bell Telephone Company, filed April 27, 1955

Answer, Counterclaim and Cross Claim of The Reuben H. Donnelley Corporation filed April 27, 1955

Answer and Counterclaim of Defendants City Bonded Messenger & Trucking Service, Inc., filed June 28, 1955

Notice and Motion of Defendant City Bonded Messenger & Trucking Service, Inc., filed August 12, 1955

Order entered August 12, 1955 granting leave to defendants to file their amendment to the counterclaim.

Amendment to defendant's Counterclaim Count III filed August 12, 1955

Answer to Counts I and II of Defendant's Counterclaim filed September 1, 1955

Order entered September 14, 1955 granting leave to plaintiff to withdraw motion to strike count 2 of defendant's counterclaim and granting leave to defendants to file amended count 2 of counterclaim.

164 Defendants' Amended Count II of Counterclaim filed September 27, 1955

Answer to Amended Count II of Defendants' Counterclaim filed October 11, 1955

Stipulation filed February 18, 1957

Order entered February 21, 1957 dismissing defendants Nadine Mansfield and Irving Mansfield as defendants

Amended Answer and Counterclaim, Amendment to defendants' Counterclaim Count IV filed February 28, 1957

Findings of Fact, Conclusions of Law and Final Judgment Order entered March 14, 1957

Order as to Defendants Illinois Bell Telephone Company and The Reuben H. Donnelley Corporation entered March 14, 1957

Order for additional security entered April 8, 1957, Notice attached thereto

Plaintiff's Notice of Appeal filed April 11, 1957 Clerk's Certificate of Mailing attached thereto

Motion for order to show cause why plaintiff should not be held in contempt of Court for Failure to comply with the order of Court entered April 8, 1957, filed April 19, 1957

Motion for order to show cause why plaintiff should not be held in contempt of court for violating the injunction and the order of Court entered March 14, 1957, filed April 19, 1957

Plaintiff's Answer to motion for Rule to show cause for alleged Violations of Final Judgment dated March 14, 1957 filed April 24, 1957

Defendants' Reply and Affidavit of Harry A. Shain filed April 26, 1957

Order entered April 29, 1957 entering and continuing generally motions of defendant filed April 19, 1957

Stipulation for record on appeal filed May 6, 1957.

165 and the Exhibits introduced in evidence and filed May 9, 1957, and the Clerk's File Copy of the Transcript of Proceedings had in the trial of this case and filed May 16, 1957 by the Official Court Reporter, certified as part of this record but for the sake of convenience, under separate certification, filed and entered among the records of the said Court in my office, on the dates indicated.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois, this 17th day of May, 1957.

Roy H. Johnson

Clerk

By Gizella Butcher (signed)

Deputy Clerk

No. 191

Office Supreme Court, U.S.
FILED
JUL 21 1958
JOHN T. FEY, Clerk.

In the United States Court of Appeals
For the Seventh Circuit

No. 12046

CITY MESSENGER OF HOLLYWOOD, INC., A California corporation, doing business under the tradename of CITY MESSENGER AIR EXPRESS,

Plaintiff-Appellant,

vs.

CITY BONDED MESSENGER SERVICE, INC., by change of name from CITY BONDED MESSENGER AND TRUCKING SERVICE, INC., an Illinois corporation, CITY BONDED TRUCKING COMPANY, INC., an Illinois corporation, THE ILLINOIS BELL TELEPHONE COMPANY, an Illinois corporation, and the REUBEN H. DONNELLEY CORPORATION, an Illinois corporation,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

Honorable John P. Barnes, Judge Presiding.

APPELLEES' APPENDIX.

ELI MULLIN
105 W. Adams Street
Chicago, Illinois
Attorney for Defendants-Appellees

The Scheffer Press, Inc.—ANdover 3-6850

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APPELLEE'S APPENDIX

Appellees adopt as their own Appellant's Appendix with the following additions and corrections:

1. Colloquy during hearing on motion for temporary order by counterclaimants and cross complainants, Illinois Bell Telephone Company and The Reuben H. Donnelley Corp. on April 22-29, 1955.

38 By the Court: You know I have been listening to everything and that is one thing I can't figure out.

By the Witness: The corporate name.

By the Court: Which did you use, your corporate name? You have a corporate name. Why don't you use it?

By Mr. Kaplan (plaintiff's first counsel). Because we are known under that name.

By the Court: You are not allowed to call yourself anything but your corporate name in Illinois. The court can't give you that right.

By Mr. Kaplan: Is your Honor referring to the statute?

By the Court: Yes.

By Mr. Kaplan: Your Honor will note that the statute says one thing, if I may state —

By the Court: You are not authorized in Illinois to
39 use anything or to act except under your corporate name.

By Mr. Kaplan: Your Honor, we are not using the name City Messenger Express, we are not holding out the term, the trade name.

By the Court: I start out, and I see unfair trade right there; there is unfair trade right there. * * *

By the Court: These two things right there, somebody used the word "City" written out. Who did it?

By Mr. Kaplan: I don't know who did this, your Honor.

By the Court: Who did? Who used it first?

By Mr. Kaplan: They used the name "City"; there is no question that the defendant here has been using the name "City Bonded".

By the Court: If those things were being used,
41 the man that copied that just handicapped himself in a court of equity.

By Mr. Kaplan: There is no indication here that we copied it.

By the Court: Now, that is possible, that a man just gets that out of the thin air. That is possible but not probable.

2. Oral opinion of the Court.

926 By the Court:

This case was started in the year 1955 and I heard a good deal about it shortly after it was instituted, for some weeks or months. It came on for trial on Monday, February 18th. The trial was started on the morning of that day and it continued through the 19th, the 20th, the 21st, the 25th, the 26th, the 27th. The last testimony, that of Mr. Irving Mansfield, was received on March 1st.

The Court asked counsel for the parties to prepare drafts of findings of fact, conclusions of law and of the judgment order they thought their respective clients were entitled to, and asked that there be submitted briefs of their respective contentions.

As I recall it, the findings of fact, conclusions of law and judgment orders were filed on last Wednesday, March 6th, simultaneously. Reply briefs were filed simultaneously on last Friday, March 8th. I took all of those papers home with me on Friday night and I read them carefully Saturday morning.

As a result of what I had heard during the trial
927 of the case and as the result of the reading of those papers to which I had referred, I came to certain

conclusions. I have indicated that I would hear oral arguments this morning, brief oral arguments, and I have heard a brief statement by Mr. Cohen on behalf of the plaintiff.

I won't proceed at great length. I will simply indicate to you some conclusions. I think the equities are clearly with the defendant. I thought the defendants' witnesses were trying to tell the truth. Generally speaking, I think they did tell the truth. I wasn't as well impressed by the witnesses for the plaintiff, particularly the father, Ben Fullman, and the son, Sidney Fullman, and Norville (Norvin) Fullman.

I thought the Fullmans manifested a desire to overreach.

The evidence indicates that Ben Fullman, the father, and Irving Mansfield had, for a number of years, been friends, and, after listening to the evidence I have the impression that Mr. Mansfield has been successful in his business and Mr. Fullman has not been so successful.

The evidence further discloses that Mr. Ben Fullman
928 conceived the idea of establishing a new venture and undertaking and he sought to interest Mr. Mansfield in it.

He did interest him to the extent of Mr. Mansfield undertaking to put up $12,000.00, approximately — $12,500.00; I don't remember — for a half interest in the enterprise.

Then what was done for the next few months? The plaintiff would have us think that Mr. Mansfield and his company were acting merely as agents for the Fullmans and their company.

As I understand the situation and the evidence, that was not the fact. What Mr. Mansfield and his company did was done under the impression that he was engaging in a joint enterprise with this Mr. Ben Fullman and his

company. That is the impression I get from the evidence.

The Fullmans would have us believe that everything that Mr. Mansfield and his company did during that period of months was done merely as an agent for and on behalf of Mr. Fullman. I do not think that was the fact at all.

The evidence further discloses that the Fullmans repudiated the agreement which they had made for the inauguration of the joint enterprise. Whereupon, Mr.

Mansfield terminated the doing of the work which
929 he and his company had been doing for the new enter-

prise. The Fullmans, claiming to establish rights by reason of what transpired during these months, then filed a bill in this court. That is the way the matter got into this court.

I don't think any good purpose would be served by my detailing the evidence. As I have indicated at the outset, I think the equities are clearly with the defendant. I went over and read the findings of fact and conclusions of law and the judgment order which the defendants think they are entitled to. They seem to me to be about right. I will study them over further and you gentlemen will come in on Wednesday, March 13th at 10:00 o'clock and I will let you know what I think further.

3. Colloquy and Entry of Order by the Court on March 13, 1957.

930 * * * By the Court: I indicated to you gentlemen on

Monday that I was inclined to accept these findings
931 of fact, conclusions of law and the draft of judgment

order suggested by the defendant and I am still of that mind.

Now, I want you to tell me one or two things. The order 5 on the last page, that the defendant counterclaimants are entitled to an award of damages for breach of contract in the amount of $15,000.00, you conceive that to be supported by what findings, particularly?

By Mr. Mullin: That is based upon the loss of this business from Emery Air Freight.

By the Court: Yes. Where are those damages?

By Mr. Levin: In considering that phase of the case, they said that the Emery people refused to give them business because they were doing business for City, for the plaintiff. But, there was testimony that they were doing work for others in that same line of business and there was in no way any indication as to what those earnings would have been.

By Mr. Mullin: Yes, there was an indication. There were two witnesses who testified there was a loss of approximately $500.00 a week.

By Mr. Levin: Not as to that particular one account. They testified over a period of time that you were
932 doing that much business with them at this time.

By Mr. Mullin: No.

By Mr. Levin: But not that there was that much business done at that particular time.

By Mr. Mullin: That was for that particular time, so far as I can recall at the moment.

By Mr. Levin: From the standpoint of the proposition, of fraud and deceit in the situation, there was, actually, if you take the entire scope of the evidence, there was a proposition that they enter into a series of negotiations. If your Honor were to consider the entire matter, it would seem to me that they had no contract. They had never consummated the deal.

Your Honor, the defendants feel that as a result of this situation, they entered into a contract, but there was no fraud involved. In other words, there could be a breach of contract situation but there was nothing done that was fraudulent in character.

By Mr. Mullin: I don't think you want us to argue the case over again, your Honor.

By the Court: No. I think the defendant counterclaimants are entitled to an award of damages
933 for breach of contract, for fraud and deceit in the

amount to be determined by the Master heretofore appointed.

By Mr. Mullin: I don't think you have appointed a Master yet, your Honor.

By the Court: I name one right in this order.

By Mr. Levin: If your Honor please, may we ask one question? This order, enjoining the use of the name "City" and all that, that it should be restricted to the area—in other words, these people are engaged in business in California, in New York and other points, in which the defendants here have no activities. It certainly shouldn't restrict the use of their corporate name throughout the country.

By the Court: What do you say to that?

By Mr. Mullin: We have no objection to using it outside of the Middle West area.

By Mr. Levin: In other words, you operate in the State of Illinois.

By Mr. Cohen: The condition is, I believe, that they operate within a radius of 50 miles of 193 North LaSalle.

By Mr. Mullin: That is right, doing business with co-operating messenger services in Wisconsin and so 934 forth.

By the Court: Well, within Chicago or a 50-mile radius thereof. You can fill that in. Is there anything else?

By Mr. Mullin: All right.

By the Court: Now, where is the Telephone Company?

By Mr. McBurney: Your Honor, I have prepared a separate order.

By the Court Let me see it.

(Document handed to the Court.).

By Mr. McBurney On behalf of the Illinois Bell Telephone Company and the Reuben H. Donnelley Corporation, Mr. Mullin and I have agreed as to the language in the order.

I did not have an opportunity to take it up separately with Mr. Cohen. He now has a copy. The substance of this is to limit the telephone company listings in the telephone directory and the Donnelley Corporation listings in the classified directory, in line with the provisions of the order which your Honor just entered, specifically Paragraph 1 of the judgment order, directed to the other parties in this case.

By the Court: When can you make the change in
935 this?

By Mr. Mullin: I can do that immediately, your Honor.

By the Court: Rewrite the first page. Rewrite the first page so it is the findings of fact, conclusions of law and the judgment order of the Court.

By Mr. Levin: If your Honor please, one more request on the part of the plaintiff—

By the Court: Have you given copies to the other side?

By Mr. McBurney: Yes, sir.

By the Court: What is it, Counsel?

By Mr. Levin: If your Honor please, in the second provision in the proposed judgment order is the language that defendants are entitled to an order causing plaintiff to surrender, at its direction, all matter bearing the name, style or mark including the word "City," or the phrase "City Bonded Messenger" or "City Messenger."

The first section restricts us particularly within this area.

By the Court: Would it be used just outside of this district?

By Mr. Levin: We can use that material in other parts.

936 By Mr. Mullin: With Chicago addresses?

By Mr. Levin: You can X that part out because it has all the other addresses.

By Mr. Mullin: I hate to take the chance of permitting them to do that.

By the Court: I will take that chance. If they come within a 50-mile radius and use that name, they will be in trouble.

By Mr. Mullin: That includes—

By the Court: 50 miles.

By Mr. Levin: It is 50 miles from Chicago.

By the Court: 50 miles within the radius of Chicago, if I know my geography.

• • •

4. Colloquy and action by the Court on defendants' motions to show cause why plaintiff should not be held in contempt for violation of the judgment injunction issued March 13, 1957 and the Order of Court entered April 8, 1957 commanding plaintiff to file additional security in the amount of $7,500.

3 • • •

10 By the Court: I have thought about this matter, gentlemen. I am ready to take action here. I am afraid it will not please either side, but I think it is wisest.

This case, how long were we trying this case?

By Mr. Mullin: It was about eight days, I think.

By the Court: Well, we spent about eight days hearing about the controversy between the parties. The Court used the best judgment it had when he decided the 11 case, good, bad or indifferent, but the best the Court had.

The Court then thought and still thinks that that case was properly decided. The Court thinks that when this case is considered by the reviewing court, the judgment of this Court will be affirmed, if the waters are not muddied by these collateral matters.

If I send somebody to jail today, he will go up in the

Court of Appeals, and they may think they are getting pressure, and you may get snap judgment. That isn't what you want.

You want your case heard. I am morally certain, when that case is heard in due course, it will be affirmed.

I think it would be bad judgment to take up contempt orders and one thing or the other. You might get snap judgment.

That judge down there will say, "I want to look into this," I am sure of that.

Give that court an opportunity to review that matter and try that case on its merits. I think it will be affirmed.

I am not sure about your opponents but what they want to muddy up the water a little bit. That wouldn't be surprising. There wouldn't be anything wrong about that from their part.

I am going to enter these motions and continue them generally. You devote your energies in trying that case to the Circuit Court of Appeals. I think you will win it, if you don't muddy the waters with these collateral issues.

By Mr. Mullin: What it amounts to, your Honor—

By the Court: It amounts to just what has been going on ever since the plaintiff started the suit in this court, just exactly the same thing.

By Mr. Mullin: Does that mean then we do not continue with the accounting?

By the Court: Well, if I were you, I would get this case through the Appellate Court.

By Mr. Mullin: That is what they want—I mean they want to delay this thing.

By the Court: You want to win your lawsuit, and don't get it muddied up with collateral matters.

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6. Additions to and corrections of Appellant's Appendix page 49-50:

TESTIMONY OF IRVING MANSFIELD

40 * * * Q. Now, directing your attention to a lawsuit that was pending in the Municipal Court of Chicago, No. 55 M 2286, do you know who the parties to that lawsuit were?

By Mr. Mullin: I will object to that. I fail to see what another lawsuit has to do with this case.

By Mr. Cohen: If your Honor please, I hope to be able to connect up that litigation with the present litigation, and I think some of the facts brought out in that case will have pertinence here.

By Mr. Mullin: Your Honor, I believe that case has been settled, and the facts that were brought out in that case have nothing to do with the facts in this case. This is a separate lawsuit.

By Mr. Cohen: I think it has a bearing here, and if I am permitted I would like to proceed. If the Court then feels it is not pertinent, I will offer no objection
41 to striking the testimony.

By Mr. Mullin: Has it been settled or not?

By Mr. Cohen: Yes, it has been settled.

42 By the Court: Well, I don't want to try any other lawsuit if it is unnecessary. Does anybody plead res judicata or anything of that kind?

By Mr. Mullin: Your Honor, it has been settled, and I don't believe there was more than an iota of evidence offered at that time. I did not represent the defendant in that lawsuit, but I fail to see what bearing that lawsuit could have on this lawsuit; merely to clutter up and extend it.

By Mr. Cohen: No, I don't think so. I think the facts of record in that case are material to bringing out my case here.

By Mr. Mullin: Can't you bring out the facts in this case, whatever you like?

By Mr. Cohen: All right.

I will withdraw that question.

* * * *

43 * * * Q. Did you from time to time render bills for these services, bills to the plaintiff corporation here?

A: The first couple of months we did, but I had conversation with Mr. Fullman, and inasmuch as we were entering into an agreement to go into business together he said, "You know I haven't any money to pay any of these bills, and inasmuch as we are going into business I would suggest that you hold them to a later date until we go into business together."

By Mr. Cohen: If your Honor please, I move
44 the last portion be stricken, and just the direct answer left.

* * * By Mr. Mullin: The answer explains it.

By Mr. Cohen: Your Honor, he said he did from time to time, and then it could stop. Anything after that is definitely not responsive.

By the Court: Oh, I think I will let the answer stand.

By Mr. Cohen: That is all. I will introduce at this time as Plaintiff's Exhibit 1 this air bill.

Is there any objection?

By Mr. Mullin: I have no objection to that, but I would like to clarify some of the answers to questions that were made here, if I may.

By the Court: It may be received.

(Said document, so offered and received in evidence, was marked Plaintiff's Exhibit 1.)

By the Court: Go ahead.

45 By Mr. Cohen: You can (can't) introduce him as a witness here. He is a hostile witness.

By Mr. Mullin: Are you objecting?

By Mr. Cohen: Yes, I object.

By the Court: The rule provides for it. Is says, "may be cross examined by the adverse party only about the subject matter of his examination in chief."

By Mr. Mullin: Right.

* * *

8. Additions to and corrections of Appellant's Appendix page 51-52.

51 * * * By Mr. Mullin:

Q. Thereafter you stated you had additional conversations and exchanged correspondence. Will you take them in the sequence in which they occurred and tell us about each interchange of correspondence and the meetings.

A. Well, there was an exchange of correspondence and many telephone calls back and forth. Mr. Ben Fullman invited me to come to Los Angeles and see the operation out there. That was in the early part of August. At the time I couldn't get away, but I arranged to fly out to California in the early part of Septem-

52 ber. I think it was over Labor Day.

Q. What year?

A. 1954 that was.

Q. What occurred there in Los Angeles then?

A. When I arrived in Los Angeles I contacted my brother who was a practicing attorney and a CPA out there, and I asked him to—he had already known about this proposition we were entering into, and I asked him to meet me and go over to Mr. Fullman's office. I think that was located then at 1414 Cole Place, which we did. We went over there together that day.

Q. What occurred there?

A. We sat down, my brother and Mr. Ben Fullman, and we discussed the proposition of going into a partnership. At first he wanted to merger City Bonded Messenger Service & Trucking Service of Chicago with City Messenger of Hollywood, at that time.

By Mr. Cohen: I will object to that.

By the Witness: I wasn't too familiar—

By Mr. Cohen: I think the answers that the defendant or the witness is giving are not in proper order.

53 There should be a relating of the conversations.

By Mr. Mullin: He is relating the conversations.

By Mr. Cohen: He is not relating the conversations, what he said and what somebody else said.

By the Court: If it is possible have him state what he said and what the other person said, and the time and place.

By the Witness:

A. This took place in Mr. Fullman's office in Los Angeles. My brother Elias was present at the time, and Mr. Ben Fullman suggested a merger of the two companies. I didn't know too much about their operation out there.

By Mr. Mullin:

Q. Do you recall the specific words or approximately the specific words you used?

A. That he would like to see the two companies merged. The City Bonded Messenger Service and the City Messenger of Hollywood, he meant. I asked advice of my brother at the time and he said, "Well, first, I don't know anything about their financial conditions

54 and, secondly, I wouldn't suggest a merger."

So I think my brother asked him for a financial statement at the time, and Mr. Ben Fullman gave my

brother a financial statement. Of course he, being a certified public accountant, looked it over. I was not familiar and wouldn't know too much about it myself. He said to me in the presence of Mr. Ben Fullman, "These people have no assets. How can you enter into an agreement of this kind?"

Mr. Ben Fullman said, "True, we have no assets."

Q. Then what happened?

A. That immediately put a damper on the merger part of the proposition, so Mr. Ben Fullman said, "Well, in what other way can we get together?" So my brother suggested, oh, he already had that, that Mr. Fullman had already had the CAB permit at the time.

By the Court: Already had what?

By the Witness: The CAB permit.

By Mr. Mullin: Civil Aeronautics Board?

By the Court: Yes.

By the Witness:

55 A. (Continuing) He mentioned at the time that my brother wanted to form a new corporation, and Mr. Ben Fullman informed them the CAB certificate was not transferrable, and we could not enter into an agreement of that kind. My brother suggested that I could buy into the present corporation of City Messenger of Hollywood.

By Mr. Mullin:

Q. Were there any specific terms discussed at that time?

A. Mr. Ben Fullman said that it cost him in the neighborhood of twelve to fifteen thousand in traveling expenses and so forth, and legal fees, to obtain the CAB permit. We agreed that I would put up twelve thousand or twelve thousand five hundred.

Q. Dollars, that is?

A. Yes, sir, surely. And they would put up—the $12,500.00 I would put up, and they would put up the assets and the CAB permit of City Messenger of Hollywood.

Q. What were you to receive for that $12,500.00?

A. We were to form a corporation and I was to receive 50 per cent of the stock.

Q. Well, what happened after that?

56 A. Well, it was agreed upon by Mr. Ben Fullman and myself that would be the deal.

* * *

9. Additions to and corrections of Appellant's Appendix page 59:

TESTIMONY OF BENJAMIN FULLMAN

98 * * * Q. Did Modern Delivery Service develop any marks or anything else that did distinguish it from other companies during the time that you were associated with the company?

A. Yes, we did.

Q. What marks were developed?

99 A. First, in 1937, we developed a large word in print, City, with a space in the middle of the letters and it had the word "Bonded" put in the space.

Then, in 1946, we did away with that and we had an advertising agency develop the script, City, with the character of a boy stepping through the C.

Q. Can you give the Court the name of the advertising agency that developed this last mark for you?

A. The Perritt Company.

Q. And who is the executive officer of that company?

A. Well, Mr. Perritt. He is still connected with it, I believe. I believe he is president of the company.

By Mr. Mullin: Your Honor, I will object to this entire line of questioning. There has been no chain of

title established between Modern Delivery Service and the plaintiff in this case.

By Mr. Cohen: I will come to that, if your Honor please.

100 By the Court: You are going to undertake to connect it up?

By Mr. Cohen: I will connect it up.

By the Court: How are you going to do it?

By Mr. Cohen: I have in my files here a sale or a lease of the name City Messenger.

By Mr. Mullin: And I have a copy of the transcript of the bankruptcy of the Modern Delivery Service.

By the Court: Of what?

By Mr. Mullin: The bankruptcy of Modern Delivery Service.

101 By Mr. Cohen: Given the opportunity, I will show it, if your Honor please.

By the Court: Go ahead.

By Mr. Cohen: If the Court will excuse me a moment—

By the Court: Yes.

By Mr. Cohen: Miss Reporter, will you please mark this Plaintiff's Exhibit 2 for identification?

(Thereupon said document was marked Plaintiff's Exhibit 2 for identification.)

By Mr. Cohen: And will you please mark this Plaintiff's Exhibit 3 for identification?

(Thereupon said document was marked Plaintiff's Exhibit 3 for identification.)

By Mr. Mullin: I will reserve the right to object to these as not complete signatures, although it states it is a true copy and so forth. But, you may introduce them for what they are worth.

By Mr. Cohen:

Q. Mr. Fullman, I show you Plaintiff's Exhibit 2
102 bearing the title "Minutes of Special Meeting of the Board of Directors of Modern Delivery Service," and ask you if you have ever seen that document.

A. Yes.

Q. Will you tell the Court where you saw that document?

A. In my office at 1120 South Olive Street, Los Angeles, California.

Q. In what year?

A. 1947.

Q. Where did that particular document come from?

A. Well, it came out of records.

Q. Out of your personal records?

A. No; out of the records of Modern Delivery Service.

Q. And where are those records now?

A. I don't know where those records are, whether they have been destroyed or are still in effect.

Q. Where has this lodged since the time that it was executed, this Plaintiff's Exhibit 2?

A. That was in the hands of Sam Chess and Sidney Fullman.

Q. I direct your attention to the signature under the word "Approved," and the typewritten "Ben Full-
103 man, President." I direct your attention to that signature and ask you whether you recognize it.

A. Yes. It is my signature.

Q. Will you tell the Court when that signature was affixed to that document?

A. It was affixed on the 29th of April, 1947.

Q. Now, was, in fact, a special meeting of the Board of Directors of Modern Delivery Service held on that day?

A. Yes.

Q. And does that document represent a true and correct representation of the events of that day?

A. Yes.

Q. Now, I show you Plaintiff's Exhibit 3 and ask you whether or not you have ever seen that instrument before.

A. Yes.

Q. When did you see that instrument?

A. When it was made.

Q. When was it made?

A. That was made in April, 1947.

Q. Can you tell the Court where that document or instrument comes from?

A. Well, that came from the records of Fullman 104 and Chess, Sam Chess and Sidney Fullman.

Q. And has it lodged there from the time that it was executed until now?

A. Yes.

Q. I direct your attention to the written signatures that appear on that instrument and ask you whether or not you recognize those signatures.

A. Yes, I do.

Q. Whose signatures are they?

A. Well, there is Sidney B. Fullman's signature and Sam Chess' signature and C. J. Cullom.

Q. Who is C. J. Cullom?

A. She was the secretary of the corporation at the time.

Q. Does this instrument truly reflect the events and purposes of that document?

A. Yes.

Q. Now directing your attention to on or about April 29, 1947, did Modern Delivery Service, as a fact, sell or lease the name of City Messenger Service to Fullman and Chess?

A. Yes.

Q. Do you know of your own knowledge whether
105 or not Modern Delivery Service received any consideration for the execution of these documents?

A. Yes, they did.

Q. Will you tell the Court how much it was, or, what was the consideration?

A. It was twenty-five hundred and some odd dollars.

Q. And it was, in fact, paid?

A. Yes, paid in cash.

Q. Now, do you know of your own knowledge whether or not Fullman and Chess operated the name City Messenger Service?

A. Yes, they did.

Q. Do you know of your own knowledge how long they operated?

A. Well, they operated right along, and then, in 1951, they incorporated into City Messenger of Hollywood, Incorporated, and it is still in operation.

106 By Mr. Cohen: If your Honor please, I will offer Plaintiff's Exhibits 2 and 3 in evidence.

By Mr. Mullin: I will object to the introduction of these, your Honor. They are not fully signed. There are spaces that are unsigned. They purport to be a true copy.

By Mr. Cohen: Well, Eli, you are not going to object on that score. You were talking about it.

By Mr. Mullin: But they are unsigned.

By Mr. Cohen: You were not going to object as to the genuineness of that document if I could prove up the balance—

By the Court: What is your objection?

By Mr. Mullin: My objection is to the introduction of those documents as true copies. They are unsigned. He hasn't established any background for them except through a prejudiced witness.

If he can produce the corporate minute books or any of the other records of the corporation, I will withdraw my objection.

107 By the Court: Is this the corporation you say went bankrupt?

By Mr. Mullin: Yes.

By the Court: When?

By Mr. Mullin: The debtor's petition is dated July 15, 1948. That is the date it was filed.

By the Court: Well, what is this offered as, as part of the minutes?

By Mr. Cohen: That is offered as a particular document showing the sale of the name, the sale of the use of the name City Messenger, from Modern Delivery to Sam Chess and Sidney Fullman.

By the Court: Well, the minutes purport "The agreement attached hereto." There isn't any agreement attached hereto.

By Mr. Cohen: If your Honor please, when I took over the file from the former counsel, that was the condition that I found it in.

By the Court: Well, I know, but —

By Mr. Cohen: It may be, if your Honor please,
108 that that was attached to it; I don't know.

By the Court: Well, this paper at one time evidently had something attached to it which has been taken from it. Do you see that (indicating)? There is no such place up there (indicating).

By Mr. Cohen: It could be, if your Honor please, that one is an original and one is a copy because now there is on one no indication whatsoever that it is not the original.

By the Court: There is an indication on this one that it isn't complete. There is an indication, for instance, on

Plaintiff's Exhibit 2 that it isn't complete because it says, "The agreement attached hereto."

By Mr. Cohen: Well, let us ask the witness.

By Mr. Cohen:

Q. Mr. Fullman, what agreement, if —

By the Court: Now you are contradicting a written instrument.

By Mr. Cohen: Well, I am not.

By the Court: Well, it says, "The instrument at-
109 tached hereto."

By Mr. Cohen: I was going to ask Mr. Fullman whether or not the Plaintiff's Exhibit 3, whether that copy was —

By the Court: Attached.

By Mr. Cohen: — was attached, or whether the original of that copy was attached.

By the Court: Well, you ask him that and see what he says. Not as to the rest of them but as to whether or not this one was.

By Mr. Cohen:

Q. Now, Mr. Fullman, Plaintiff's Exhibit 3, was that or was that not attached to Plaintiff's Exhibit 2? Do you know what I am talking about as exhibits?

A. Yes. These two items here, one of them was made in two copies. One we gave to Chess, Fullman and Chess, and the other one we kept at the office there, at the Modern Delivery Service.

By the Court: Well, he hasn't answered your question.

The question was whether Plaintiff's Exhibit 3 was
110 attached to Plaintiff's Exhibit 2.

By the Witness: No, I don't believe those two were attached together.

By the Court: I don't either. The objection is sustained.

By Mr. Cohen: Well, now, if your Honor please—

By Mr. Mullin: I, therefore, move to strike all the testimony relating to the mark prior to the Modern Delivery Service, or prior to City Messenger of Hollywood, Inc.

By the Court: Oh, let it stand.

111 By Mr. Cohen:

Q. Mr. Fullman, do you know of your own knowledge whether or not Modern Delivery Service ever sold for consideration the use of the name City Messenger Service, to anyone?

A. Yes.

Q. To whom did they sell it?

A. They sold it to Sam Chess and Sidney Fullman.

Q. And for what consideration?

A. They got a little over $2500 for it.

Q. Modern Delivery Service received that money?

A. Modern Delivery Service received that money.

By Mr. Cohen: Will you mark this Plaintiff's Exhibit 4 for identification?

(Thereupon said document was marked Plaintiff's Exhibit 4 for for identification.)

By Mr. Cohen: Incidentally, your Honor, this Plaintiff's Exhibit 4 has been stipulated to, as to the genuineness.

By Mr. Cohen:

Q. I show you Plaintiff's Exhibit 4 and ask you whether or not you have ever seen that paper or 112 exhibit.

A. Yes.

Q. When did you see that?

A. When it was made, December, 1937, the first of December—about the latter part of Novemmber, it was made, in 1937.

Q. And at whose direction was that instrument made?

A. At my direction.

Q. Was that ever sent through the mails or given to anyone?

A. It was sent through the mails.

Q. How many, if you recall?

A. We sent out a thousand of them.

Q. And in what area of the United States was that sent?

A. In and through Los Angeles and Hollywood.

Q. Directing your attention to the heading of this, "City," with the word "Bonded" in between, was that your mark or identification at that time?

A. Yes, it was.

Q. Do you know how long you used that?

By Mr. Mullin: I object to the use of the word "you." To whom are you referring?

By Mr. Cohen: I am sorry.

113 By Mr. Cohen:

Q. What was the name of the company at that time?

A. It was City Messenger and Express Company, Modern Delivery Service, doing business as City Messenger and Express Company.

114 Q. What was the name of the commpany at that time?

A. The City Messenger Express Company, Modern doing business as City Messenger Express Company.

Q. Was that that company's mark or identification at that time?

A. Yes.

Q. And for how long was it that company's mark or identification?

A. That was about July, 1937.

Q. From that time until when?

A. Up until 1946 we used that mark.

By The Court: Who is "we?"

By The Witness: The Modern Delivery, City Messenger and Express Company.

By The Court: Well, was it a company or wasn't it? Who was it, a partnership?

By The Witness: No. Modern Delivery Service was a corporation, and City Messenger Express Service at that time was an assumed name.

By Mr. Cohen:

Q. At that time the corporation was doing business under an assumed name?

A. Yes.

115 By The Court: Are we going to have any charters or articles of incorporation?

By Mr. Cohen: Well, if your Honor please, in the relatively short time I was able to familiarize myself with this case I was unable to accomplish many things.

By The Court: It is not a short time this case has been pending. It is over a year and a half.

By Mr. Cohen: I respectfully submit to your Honor that when I originally took over this matter—

By The Court: April 19, 1955.

By Mr. Cohen: When I came into this matter on the 15th of January, 1957, I honestly had the feeling I could settle this matter with Mr. Mullin and his clients. I find I am unable to do that, and as I advised the Court on Friday, there were many areas where I felt I was not completely prepared.

By the Court: Now, it is your client's question of diligence or negligence, and this case has been set for

116 this time for a long time, and I believe the defendants have some rights. The defendants do have some rights, you know. They have a right, when somebody started suit against them, to have it disposed of within a reasonable time.

Certainly from April 19, 1955 to February 18, 1957 is a reasonable time. That is a reasonable time to get ready if you start a lawsuit.

By Mr. Cohen: Well, the client, if your Honor please, is not responsible for the preparation.

By The Court: Yes, he is, exactly so.

By Mr. Cohen: He relies upon his attorney.

By The Court: He is just exactly responsible for it. I am just inquiring now whether I am going to see any articles of incorporation or anything of that sort, or are we just going to talk loosely about a company that called itself so-and-so, and then used some other name?

By Mr. Cohen: At this time I am not able to produce those documents.

By Mr. Mullin: All this testimony relates to some-
117 thing that took place before the present plaintiff in the case was even in existence, and they have not established any chain of title there. I don't see how we can even consider it.

By Mr. Cohen: If your Honor please, I think we have established a definite chain. Mr. Fullman here has testified that officers of the plaintiff corporation included himself, Sidney and Elliott Fullman, Norville (Norvin) Fullman, and I think since Sidney Fullman was a person who bought and used the name of City Messenger Service there is definitely a chain of title.

By The Court: Well, when you give something to a corporation you make a conveyance if you have something to give. Aren't you going to be able to show anything of the kind?

By Mr. Cohen: I have nothing other than the documents I proposed to use, and I have offered them in evidence to indicate the sale from Modern Delivery Service to this partnership of Fullman and—

118 By The Court: But you offer what is supposed to be a transcript of a corporate record. It is not complete, but cites on its face something should be attached, and it is obvious that something has been torn from it up in the corner.

Then you produce another paper purporting to be executed to the corporation, the corporation having a president, vice-president, and the only execution is by the secretary. Ordinarily the secretary does not bind the corporation.

By Mr. Mullin: Your Honor, I would like also to call your attention to the suit as filed by City Bonded doing business as City Transportation Company and City Messenger. How can they have signed other names and permitted the same corporation to use it, and then go into bankruptcy?

That is why I questioned the authenticity of that document.

By Mr. Cohen: If your Honor please, I will make every effort to see if I can find the document of the
119 Modern Delivery Service to show there was in fact a sale at that time.

May I go forward?

By The Court: Go ahead, but I don't see where you are getting.

Go ahead.

120 By Mr. Cohen:

Q. Directing you attention to the heading and the word "City." Was that the corporation's mark at that time?

A. Yes.

Q. And for how long was that the corporation's mark?

By The Court: Where is it? Where is the mark?

By Mr. Cohen: If your Honor please, I am relating

to Plaintiff's Exhibit 4 which the witness has in his hands.

By the Court: I see. Well, I haven't seen it.

(Document handed to the Court.)

By Mr. Cohen:

Q. Mr. Fullman, I will ask you—

By The Court: Go ahead.

By Mr. Cohen: If your Honor please, the plaintiff's exhibit is only the one on the upper side. I have not attempted to introduce the others.

By Mr. Cohen:

Q. I direct your attention to the reverse side of
121 Plaintiff's Exhibit 4 and ask you, when were those cards printed, if you know?

A. They were printed in 1938.

Q. Were they distributed?

A. Yes.

Q. In what area or what community were they distributed?

A. In Los Angeles and Hollywood, California.

Q. And these also contain the mark of the corporation?

A. Yes.

By Mr. Cohen: I wiill offer Plaintiff's Exhibit 4 for identification in evidence.

By The Court: Any objection?

By Mr. Mullin: No objection, Judge.

By Mr. Cohen: No, this has been stipulated.

By Mr. Mullin: I might say the only objection is that he still has not established a chain of title between these documents and the present plaintiff. Except for that reservation I have no objection.

* * *

122 * * * By Mr. Cohen:

Q. Mr. Fullman, with what company were you associated in 1951, in the latter part of 1951?

A. With City Messenger of Hollywood, Incorporated.

By The Court: I didn't hear that.

By The Witness: City Messenger of Hollywood, Incorporated.

By Mr. Cohen:

Q. I will show you Plaintiff's Exhibit 5 and ask you whether you have ever seen that letter before this?

A. Yes.

Q. Where did you see it, where did you first see it?

A. Well, I dictated this letter on September 25, 123 1951.

Q. I show you page 2 of this letter and ask you whether or not you recognize that signature?

A. Yes.

Q. Whose signature is it?

A. That is Irving's, Irving Mansfield's.

Q. Just a moment ago you said you dictated that letter?

A. That's right.

Q. Is that correct?

A. Yes.

Q. Were you in Chicago at that time or were you in Los Angeles?

A. No, I beg your pardon, I did not dictate this letter.

Q. Did you receive that letter through the mails?

A. I received this letter through the mails.

Q. And that was in response to what?

A. Well, that was in response to a request I had made to Irving Mansfield to settle up a cooperative ad that our company, City Messenger of Hollywood, and Mercury Messenger Service in New York and City Messenger in Chicago had bought from the Diners Club. I believe 124 it was about six or seven hundred dollars.

Q. Is that your stationery?

A. No, that is not my stationery.

Q. Where has his letter been since September 25, 1951?

A. I believe we got that in New York, the Mercury Messenger people.

10. Additions to and corrections of Appellant's Appendix, page 69:

154 By Mr. Cohen:

Q. I present to you Plaintiff's Exhibit, Group Exhibit 9-A and -B, and ask you whether or not you have ever seen those documents.

A. Yes.

Q. What are they?

A. That is a certificate of business, doing business under fictitious name for City Messenger Express Company.

Q. That is Exhibit -A of Group Exhibit 9, is that right?

A. Yes.

Q. And -B?

A. This is a copy of our articles of incorporation of Modern Delivery Service.

By Mr. Mullin: I object to that. The document speaks for itself, and I think the explanation given was incorrect.

By the Court: Objection sustained.

By Mr. Cohen:

Q. I direct your attention to — no, I will withdraw that.

By Mr. Cohen: I will offer Group Exhibit 9-A and 9-B in evidence. These two documents bearing the

155 hand and seal of Harold J. Ostly, Clerk of the Superior Court of the State of California in and for the County of Los Angeles, by R. Luskin, Deputy.

I present that on the basis they are certified copies.

By Mr. Mullin: We do not object to the authenticity of the documents, but object to the introduction in evidence, on the ground Modern Delivery Service has still not been connected up in the chain of title with the plaintiff in this case.

By the Court: Let me see it.

(Whereupon documents were handed to the Court.)

By the Court: They may be received subject to the objection, gentlemen.

158 Q. During or at any of these conversations which you related to the Court previously, did you and Mr. Mansfield ever reach a firm agreement, understanding or contract concerning City Messenger Air Express?

A. Well, I don't understand what you mean about the contract.

Q. I will repeat the question or rephrase the question. The defendant corporation and Mr. Mansfield allege in their answer that you, together with others, represented that you and the defendant corporation or the defendants themselves would join in the ownership and operation of an air freight forwarding business to be known as City Messenger Air Express.

My question is this: During any of those conver-
159 sations which you have related to the Court before, was ever such an understanding or agreement reached?

By Mr. Mullin: I will object to that. He is asking for a conclusion. He can testify as to any facts, but not as to a conclusion.

By the Court: Yes. Sustained.

By Mr. Cohen:

Q. Were any of your conversations specific in terms of any arrangement or contract?

By Mr. Mullin: I will object. He is leading the witness. This is direct testimony.

By the Court: Sustained. You can ask him if he has told all of the conversations they had about it.

By Mr. Cohen:

Q. As you have related these conversations previously,

have you told the Court fully and completely what transpired?

A. Yes, I have. In essence, I have given the highlights of the various conversations we had.

Q. Mr. Fullman, did you ever have the authority
160 from your corporation to enter into an agreement concerning joint ownership of the operation of City Messenger Air Express?

By the Court: You are asking him a conclusion. If he answered, that would be a proper question of law. Sustained.

By Mr. Cohen No further direct.

* * *

11. Additions to and corrections of Appellant's Appendix, pages 70-72:

163 Q. Sidney Fullman was president prior to that?

A. Yes.

Q. What was Sidney Fullman's position while you were president?

A. He was vice-president.

Q. Now, you testified, Mr. Fullman, that you were associated with Cannonball Messenger and Delivery Service and with Twentieth Century Delivery Service.

You further testified that these two companies were located in Chicago.

Were you ever associated with either one or both of these companies in any location other than in Chicago?

A. At the same time I was in Chicago?

Q. No. I asked you, were you ever associated with either Cannonball Delivery Service or Twentieth Century Delivery Service, in any location other than in Chicago?

A. Well, Twentieth Century Delivery Service was in Los Angeles prior to that. I was associated with them there. And Cannonball was an assumed name for them in one of their divisions.

Q. That was an assumed name for Twentieth Century?

A. Yes. That was prior to the time that I was
164 connected with these companies in —

Q. And where were they located?

A. Prior to those companies, I was located in Chicago.

Q. No. I said prior to their location here in Chicago, where were they located?

A. Twentieth Century, is that what you said?

Q. Yes..

A. They were located in Los Angeles.

Q. Twentieth Century, then doing business as Cannonball, was located in Los Angeles?

A. No. Twentieth Century Delivery Service was a company that operated delivery service from Santa Barbara to the Mexican border and as far east as San Bernadino and they operated branches in Santa Barbara, San Diego, Long Beach, Riverside, Santa Ana, and Pasadena and Cannonball Messenger and Delivery was a special delivery service.

Q. And where did they operate?

A. Locally in Los Angeles.

Q. What was your connection with these companies?

A. I was vice-president.

Q. You were vice-president?

A. Yes.

Q. Did you own any stock in these companies?

165 A. Yes, I did.

Q. Were you a majority stockholder?

A. No.

166 Q. How did you terminate your association with these companies in California?

A. Well, it was a freeze-out.

By Mr. Cohen: Objection.

By the Court: I can't hear you.

By Mr. Cohen: The question was, how did he terminate his association. If your Honor please, the direct questioning didn't touch upon anything in California until Mr. Fullman came there or went there in 1938, I believe it was.

By Mr. Mullin: He brought out that he was connected with Cannonball and I am bringing out now where it was.

By the Court: This gentleman is not on adverse examination. He was put on as a witness.

By Mr. Cohen: That is true, your Honor.

By the Court: And as I understand it, from the time he started he was executive of the plaintiff company.

By Mr. Cohen: Correct, sir.

By the Court: The examination can be quite
167 broad.

By Mr. Cohen: Granted, but —

By the Court: The objection is overruled.

By the Witness:

A. It was a freeze-out.

By the Court: It was what?

By the Witness: A freeze-out. The United Parcel Service bought controlling interest in the company and my job was terminated, so there was nothing for me to do except to take money from my stock and leave.

By Mr. Mullin:

Q. And then you came to Chicago?

A. Yes.

Q. What was the year, then, that you came to Chicago?

A. I believe, if my memory serves me correctly, I believe I came here in 1935.

Q. When did you terminate your relationship with Twentieth Century and Cannonball in California?

A. 1934.

By the Court: Speak up. What? Keep your voice
168 up. I can't hear you.

By the Witness:

A. In 1934.

By Mr. Mullin:

Q. Did Cannonball Delivery use any symbols or trade marks or service marks that you know of in California?

By Mr. Cohen: Objection. If your Honor please, that is beyond the scope of the direct examination. In fact, if you Honor please, it is far beyond.

By the Court: No. I have tried to explain to you a bit ago that this man was a high executive officer of the plaintiff at the time the suit was brought. Therefore, he is put forward, I assume, as one of its leading witnesses.

By Mr. Cohen: Correct, sir.

By the Court: Therefore, he is subject to broad cross examination.

By Mr. Cohen: Not beyond the time of —

By the Court: I have ruled, now, and I am not 169 going to listen to argument upon that simple matter.

By Mr. Mullin:

Q. Will you answer the question?

By the Witness: Would you read the question to me again?

(Thereupon the question was read as above recorded.)

By the Witness:

A. I believe they had the word "Cannonball" in script. The script is described this way: The letters were large at the beginning, and when it got to the last letter, the "L", they became smaller and showed the script in the form of speed, by lines.

By Mr. Mullin:

Q. Was there what appears to be a rotating cannonball at the end of the last letter of the word Cannonball?

A. I don't remember. I don't recall.

By Mr. Mullin: Miss Reporter, will you mark this Defendant's Exhibit 5 for identification?

(Thereupon said document was marked Defendants' Exhibit 5 for identification.)

170 By Mr. Mullin:

Q. I show you an advertising folder with a service mark appearing thereon and ask you if you recognize it.

A. Well, I have seen it before.

Q. Yes. Was that the service mark that Cannonball in California used?

A. I wouldn't know unless I could compare the two of them.

Q. Well, you testified that you remembered it and you described it to us. Now, is that it? You should recognize it.

A. I didn't say that.

By the Court: I can't hear you, sir.

By the Witness:

A. I didn't say that. I said I recall it and I tried to describe what I remembered.

171 Q. Well, I am showing you a mark and I am asking you if that is the mark you remember.

A. No. It looks familiar. If I could compare the two of them I could possibly say they were similar, if they were, but I am not saying they are unless I can compare the two of them.

Q. Well, based upon your memory. You said it looks familiar.

A. It looks familiar.

Q. All right.

By Mr. Mullin: Your Honor, I ask that this be admitted into evidence as Defendants' Exhibit 5.

By Mr. Cohen: Objection.

By Mr. Mullin: Your Honor, I expect to show this is the mark that was used in Chicago. I expect to show that it is one and the same.

By Mr. Cohen: If your Honor please, the mark of the Cannonball is not in issue here.

By the Court: Well, you better hold it until you show that.

By Mr. Mullin:

Q. Now, when you came to Chicago in 1935 you started a messenger and delivery service under the name of
172 Twentieth Century Delivery Service and Cannonball Messenger and Delivery Service, is that correct?

A. Yes.

Q. Did you use any of these symbols, trade-marks or service marks that had been used by the Cannonball in California?

By Mr. Cohen: Objection.

By Mr. Mullin:

Q. (Continuing) In your business here in Chicago?

By Mr. Cohen: Objection, if your Honor please.

By the Court: Sustained.

By Mr. Mullin:

Q. When you terminated your relationship with Cannonball and Twentieth Century in California, did you receive any assignment of any rights or trade-marks, symbols, trade names of the California companies?

By Mr. Cohen: Objection.

By the Court: He may answer.

By Mr. Mullin:

Q. You may answer.

By the Witness: Will you please read the ques-
173 tion?

(Whereupon the question was read as above recorded.)

By the Witness:

A. My services were just terminated.

By the Court: Well, can you answer the question? Answer the question.

By the Witness: Will you please read the question?

(Whereupon the question was read as above recorded.)

By the Witness:

A. No.

174 By Mr. Mullin:

Q. Then you had no authority for using the names Twentieth Century Delivery or Cannonball when you started your business here in Chicago, is that correct?

By Mr. Cohen: Objection.

By Mr. Mullin: I am cross examining.

By the Court: He may answer.

By Mr. Cohen: If your Honor please, the question is not relative to any matter before the Court.

By the Court: Oh, yes, it is.

By Mr. Cohen: The issue here is whether or not we have the right to use the name City Messenger Air Express in the Chicago community.

By Mr. Mullin: I am asking him.

By Mr. Cohen: And the marks.

By Mr. Mullin: We are trying to bring out the history here.

By the Court: I am holding with you.

By Mr. Mullin: Would you answer?

By the Witness: Will you please repeat the question?

175 (Thereupon the question was read as above recorded.)

By the Witness:

A. I had no authority from Twentieth Century Delivery Service in Los Angeles, to use it here.

By Mr. Mullin:

Q. Did you have authority from any other ones other than the Twentieth Century?

A. I carefully checked the names of all the companies here locally.

Q. I asked you whether you had authority from anyone. I think that can be answered yes or no.

By Mr. Cohen: I think he should let the man answer the question.

By the Court: If he would attempt to do that, but he isn't.

Just answer the question, and we will get along better.

By the Witness:

A. No.

By Mr. Mullin:

Q. Didn't you think the use of those names here in Chicago would be confusing with the identical names in California?

176 A. No.

Q. Why didn't you? Was there any reason why you didn't start a business in California under those same names rather than coming out to Chicago?

A. Was there any reason why I didn't start a business?

Q. Yes.

A. I had a yearning to come to Chicago. I wanted to get away from Los Angeles because I was a little frustrated. I was frozen out of this company, and I felt that new places to conquer gave me a stimulus to go ahead.

* * *

12. Additions to and corrections of Appellant's Appendix, pages 76-77:

201 * * * By the Court: Yes.

Let me ask the witness something: This paper marked Defendants' Exhibit 2 for identification which I have just received in evidence, signed "Ben," is that yourself?

By the Witness: Yes.

By the Court: It is addressed to "Irving Mansfield." That is the gentleman who testified here yesterday?

By the Witness: Yes.

202 By the Court: What do you mean by:

"Your letter with the samples of the 'Term and Conditions' are accepted were noted."

What does that mean?

By the Witness: Well, he sent me a note. I believe we have it in our exhibits there, something about 60 days, not responsible, or something like that, and I told him I didn't believe that that would be legal.

By the Court: He sent you a form of terms and conditions upon which pick-ups and deliveries are made, is that right?

By the Witness: Yes. That is not—

By the Court: What I want to know is, did he send you a form?

By the Witness: Yes.

By the Court: For that sort of thing?

By the Witness: That is right.

By the Court: For putting on the back of all receipts, is that it?

By the Witness: That is right.

By the Court: And you criticized it?

By the Witness: Yes.

203 By the Court: You here criticized it. You say:

"You will note that on our conditions, first paragraph, that the loss limit is set at $50.00."

—you tell him that?

By the Witness: Yes.

204 By the Court: And you say:

"unless a higher value is set or declared by the customer on the front of the ticket at the time the shipment is tendered to the driver for delivery."

You say that the terms and conditions that you provide in your receipt limits the loss to fifty dollars unless a higher value is set at the time of the delivery, to the driver. That is what you tell him, is that correct?

By the Witness: Yes.

By the Court: "In case a higher limit is set then an extra charge is made for the excess valuation."

And then you talk about the C. O. D.'s "the terms for C.O.D.'s poorly wrapped items are about the same."

You say these limitations, to make a claim, won't stand up in court. That is what you tell him, isn't it?

By the Witness: Yes.

By the Court: And then you say:

205 "Enclosed you will find samples of the terms and conditions that we accept shipments."

You say that, don't you?

By the Witness: Yes.

By the Court: And you sent him a form of yours?

By the Witness: Yes.

By the Court "The number on the AIR WAY BILL is not the registration number, but the place that I want each bill numbered beginning '01000' and up."

What you really intended to say was "00001"?

By the Witness: Yes, and that is the way they came.

By the Court: That is the way they understood you meant it?

By the Witness: Yes.

By the Court: "Have them rush proofs to you, and send them on to me."

You meant there exactly what you said, didn't you?

By the Witness: Yes.

By the Court I see. Well, what were you worried 206 about his terms and conditions on his receipts for? Why were you worrying about them?

By the Witness: He was ordering some for me.

• • •

13. Additions to and corrections of Appellant's Appendix, page 78:

215 • • • By Mr. Mullin:

Q. I believe you also testified that you never had any agreement or any understanding with the defendants as to the formation of a new company to handle the air freight forwarding business.

By Mr. Mullin: Do you have Exhibit 7, counsel?

(Document handed to Mr. Mullin by Mr. Cohen.)

By Mr. Mullin: Now will you mark this Defendants' Exhibit 9 for identification?

(Thereupon said document was marked Defendants' Exhibit 9 for identification.)

By Mr. Cohen: If your Honor please, I move that the last question of counsel be stricken, since it does not appear to be a question but rather a statement on his part.

By Mr. Mullin: I have not completed it. I am sorry. I had not completed it.

By Mr. Cohen: I am sorry, I thought you had.

216 By Mr. Mullin:

Q. (Continuing) Now, isn't it a fact that prior to May 18, 1955 or '54, during your discussions with Mr. Mansfield, you did discuss his entering into the business with you and the formation of a corporation or some entity to handle the air freight forwarding business?

A. No.

217 Q. I hand you Defendants' Exhibit 9 for identification, which purports to be a telegram.

A. Yes, I sent it.

Q. You sent that telegram?

A. Yes.

Q. And that was addressed to Irving Mansfield, City Bonded Messenger?

A. Yes.

Q. Now, I direct your attention to the sentence reading:

"CAB registration approved and issued to City Messenger Air Express, effective May 22, 1954."

A. Yes.

Q. I will direct your attention to Plaintiff's Exhibit 7.

A. Yes.

Q. That, of course, has already been introduced?

A. Yes.

Q. I note that that is addressed to City Messenger of Hollywood, Inc., doing business as City Messenger Air Express.

By Mr. Cohen: I move that all that counsel has said here should be stricken.

218 There are no questions. They are strictly statements.

By the Court: Just let him alone and maybe he will finish up.

By Mr. Cohen: I will withdraw the objection.

By Mr. Mullin:

Q. Will you tell me why there is the difference between the telegram and the letter? One states that the registration was issued to City Messenger Air Express and the letter of authorization states that it was issued to City Messenger of Hollywood, Inc.

A. When we write telegrams, we economize and we only use the words that are necessary to create a certain thought to the recipient.

Q. That is your answer?

A. Yes.

Q. And it didn't occur to you to use the name City Messenger of Hollywood, Inc. rather than City Messenger Air Express?

A. It wasn't a matter of occurring. It was just economy in writing a telegram.

• • •

14. Additions to and corrections of Appellant's Appendix, pages 79-80:

222 • • • Q. I believe you testified that you applied for your CAB license or letter of authorization the early part of 1954, around March, is that correct?

A. No.

Q. What date was it?

A. I believe in the latter part of 1953 or the early part of 1954, either of those times.

Q. The latter part of 1953 or the early part of 1954?

A. Yes.

Q. Now, at that time, what facilities did you have, did your corporation have?

By Mr. Cohen: Objection.

By the Court: What is the objection?

By Mr. Cohen: Well, he is relating to a period—if I understand the question correctly he is relating to a period prior to the authorization being issued.

223 By the Court: Well, let him answer.

By the Witness:

A. We had an office in New York. We had an office and terminal in New York and we had an office and terminal in Los Angeles.

By Mr. Mullin:

Q. Did you own any trucks or vehicles of any type?

A. Some.

Q. What trucks and vehicles did you have?

A. I don't know offhand. I would have to go and check my records.

Q. Well, would you say that you had more than 50 trucks?

A. I don't know.

Q. Well, isn't it a fact you didn't own any trucks?

A. No.

Q. Or any vehicles?

A. No.

Q. You don't remember how many you had but you do remember that you had some, is that correct?

A. That is correct.

Q. You say you had an office and terminal in Los Angeles?

224 A. Yes.

Q. Where is your terminal located?

A. 1414 Cole Place.

Q. Can you tell us what a terminal is?

By Mr. Cohen: I will object. I think he is pursuing a point that is of no value here.

By the Court: Well, he may answer.

By the Witness:

A. A terminal is a place where we receive—where freight is received and dispatched.

By Mr. Mullin:

Q. Are trucks or other vehicles maintained at the terminals?

A. No.

Q. Did you have any garage or facilities for maintaining trucks?

A. No.

Q. Where was your office and terminal in New York?

A. 203 East 36th Street.

Q. Did you have an office and terminal at 727 West 7th Street, Los Angeles, California?

A. We had a receiving office at 727 West 7th Street in Los Angeles, California.

225 Q. You said you didn't have an office but you had

a receiving office. Will you explain what the difference is?

A. Where messengers receive and pick up packages and deliver them or left them there to be transferred to another messenger or driver.

226 Q. Well, did you have an office there, then?

A. Just the receiving point. Our offices were located at 1414 Cole Place.

Q. You say that was a receiving point?

A. Yes, sir.

Q. And will you describe what a receiving point is?

A. It was a place where the messengers left their packages and picked up packages. A telephone operator was in attendance.

Q. But it was not an office; it was a receiving point?

A. Our offices were at 1414 Cole Place.

Q. Now, did you have an office at 300 South Beverly Drive, Beverly Hills, California?

A. That was also a receiving point and telephone station for our men.

Q. It was not an office?

A. No. Our offices were still in Hollywood.

Q. Did you have an office in the Rockefeller Plaza in New York?

A. No, we had no office in the Rockefeller Plaza.

Q. Did you have a lease at any of these offices other than 1414 Cole Place?

227 A. In 1954?

Q. In 1954.

A. No. We had no leases. We were on a month to month tenancy in 1954.

Q. Who did you rent from?

A. Which place are you referring to?

Q. Rockefeller Plaza, for example, in New York.

A. I think that I made the statement to you that we didn't rent an office at Rockefeller Plaza.

Q. I am sorry. You didn't have an office at Rockefeller Plaza?

A. We did have a telephone receiving station. The New York telephone company has facilities there for people like us. They have all kinds of phone booths and they have four or five telephone operators who receive messages for you and you can utilize their facilities.

228 By Mr. Mullin:

Q. Did you have a lease for your office at 1414 Cole Place?

A. Yes.

Q. Did you have any facilities, office or terminal, in Times Square?

A. We had a telephone receiving station on the same order we had at Rockefeller Plaza.

Q. Columbus Circle in New York?

A. The same in Columbus Circle.

Q. Grand Central in New York?

A. The same at Grand Central.

Q. The Battery and Wall Street in New York?

A. The same at Battery and Wall Street.

Q. Did you pay any rent or telephone bills at any of these locations we have mentioned?

A. Those facilities are given for free.

By Mr. Cohen: Your Honor, I object to this line of questioning. I have allowed counsel to continue, with the hope it might be germane to the issue. The issue here is in Chicago in regard to the City Bonded Air Express.

I am convinced this line of questioning is irrelevant 229 to the issue, and therefore I object to any further questions.

By Mr. Mullin: Some of the addresses I am reading are direct from the Complaint, and the allegations that have been made—

By the Court: Very well. Overruled.

By the Witness:

A. The facilities in those places are given for free, and we pay for all the outgoing calls. Anyone is at liberty to use them.

By Mr. Mullin:

Q. Then it is a pay station?

A. It is not a pay phone.

* * *

231 * * * Q. But you say that anyone can use it?

A. Its telephone facilities. They have telephone operators there with a series of telephones, and you pay your money at a desk, you go to the operator and tell her what number you want, give her the number, and she gets the number and give you one of the booths to use.

They also receive messages there.

232 Q. And anyone can use them, the public, or anybody?

A. Yes.

Q. Thank you.

Now, prior to March, 1954, did you have an office in Chicago? I am talking about the City Messenger of Hollywood, Inc. or City Messenger of Hollywood, Inc. doing business as City Messenger Air Express.

A. No, we had no office in Chicago.

Q. Did you have a telephone listing here?

A. I don't believe so.

Q. Did you make any pickups or deliveries here?

A. No.

Q. Did you do any of these things I have just enumerated in the Chicago area including neighboring cities in the State of Indiana?

A. Do you mean did I do any pickup or deliveries?

Q. Any pickup or deliveries or telephone listings or maintain an office.

By Mr. Cohen: Your Honor, I object. There is in the complaint I have read so far no place that goes to March, 1954 for the City Messenger Air Express and opera-
233. tions along that line.

By Mr. Mullin: Your Honor, in March, 1954, that is the date they applied for this air freight forwarding permit.

By the Court: Overruled.

By Mr. Mullin:

Q. Will you answer the question?

By the Witness: I don't remember the question.

By Mr. Mullin: Will you read it, please?

(Whereupon the question was read as above recorded.)

By the Witness:

A. No.

By Mr. Mullin:

Q. That was prior to March, 1954?

By the Court: Have you done any since?

By Mr. Mullin: Well, your Honor, they have an office now.

By the Witness: Yes, we have done it since.

By the Court: When did you open it up?

By the Witness: In Chicago we opened up an office in January, 1955.

15. Additions to and corrections of Appellant's Appendix, pages 83-84:

243 * * * Q. Did any of these 350 exclusive agents at any time guarantee your credit with air lines, Western

Union, Air Express, or any other service with whom you had business?

A. Mr. Mullin, no one guarantee my credit in Chicago.

Q. I am just asking you.

A. I am answering you. There is an innuendo that my credit in Chicago is not good, and that is not true.

Q. I am merely asking you.

A. The answer is "No."

By Mr. Mullin: That is all that is required.

* * *

245 By Mr. Mullin:

Q. Now, you testified, Mr. Fullman, that nobody ever guaranteed your credit.

I show you a letter dated August 25, 1954 marked Defendants' Exhibit 10, signed by C. H. Cuny, credit manager of United Air Lines, addressed to City Bonded Messenger & Trucking Service, and ask you if you have any reason to doubt the authenticity or veracity of that letter.

A. I never saw this letter. Neither I did authorize reply of it.

Q. Do you recall making a telephone call from Los Angeles to Irving Mansfield on August 23, 1954?

A. Very distinctly.

Q. You say very distinctly?

A. Yes.

Q. Will you repeat the conversation which took place at that time?

A. If I may have the privilege to preface it with a statement, first, and then I can come up with the telephone call.

Q. Would you mind just telling us what the telephone call was? That's all I asked you.

246 A. I really can't unless I have a chance to preface what caused the telephone call.

Q. All right. Go ahead.

A. Mr. Strynmeyer, I believe sales manager of the United Air Lines in Los Angeles, called our office and told us, "There is some difficulty with your account in Chicago where the main office of United Air Lines is. There are charges coming through there on the City Bonded Messenger and the City Messenger Air Express and they don't know which is which and, as your account is growing, we want to cut off your credit temporarily until such time as you can contact Mr. Cuny and straighten this matter out."

He said, "Will you call him?"

I says, "No; better than that, I will call my agent in Chicago and have him call on it."

So, I called Mr. Mansfield and asked him to call on Mr. Cuny at United Air Lines, explaining to him what had happened and straighten him out with what information he could, if he could do it and, if not, to phone me.

Mr. Mansfield called on Mr. Cuny and straightened the matter out. Mr. Mansfield was not authorized—

247 Q. You don't know that of your own knowledge? You are testifying—

A. Of my own knowledge I told Mr. Mansfield I did not authorize Mr. Mansfield, I told him at the time, to make any commitments for the City Messenger Air Express without notifying me first.

Mr. Mansfield called me back the next day and, in his suave way stated, "I got you all fixed up. I am personally writing a guarantee."

I says, "You didn't have to do that, we have credit."

He says, "Well, it is all straightened out. Forget about it."

Q. But your credit was cut off before you called Mr. Mansfield, is that correct?

A. Yes, for the one day.

Q. Well, Mr. Mansfield acted immediately and the next day your credit was reinstated?

A. I called him as a friend to call up there and see Mr. Kuehne and see what it was, because they had City Bonded Messenger of Chicago and City Messenger Air Express, Hollywood—City Messenger Air Express, rather, mixed up.

* * *

16. Additions to and corrections of Appellant's Appendix, pages 87-88:

258 * * * Q. You just testified that neither you nor anyone else in your organization authorized the defendants to put these telephone numbers on the books. You further testified that the books that you were referring to in the letter of May 1st was Defendants' Exhibit 11, is that correct?

259 A. I said that is the book we have been using the last couple of years.

Q. No. I am asking you, is this the book that you referred to in your letter dated May 1, 1954? You were asked that question and you said "Yes."

A. In this book (indicating)?

You asked me if we used it and I said we used it a couple of years.

Q. Your counsel, Mr. Cohen, asked you if this was the book that is referred to in this letter of May 1st. What did you answer to that?

A. May 1st?

Yes, I believe May 1, 1954.

Q. This letter right here. You read that letter? It has been introduced. It is Defendants' Exhibit 8.

A. I don't know if it is the same book. I believe it to be the same book.

Q. Well, I don't mean the exact same book, but, this is an example of one of the books?

A. Yes, that is an example. We have reprints of them from time to time.

Q. It is not this book (indicating)?

260 A. Not this book.

By the Court: "This book"? Now, which one is that?

By Mr. Mullin: Defendants' Exhibit 6. I am sorry.

261 By Mr. Mullin:

Q. Now, referring to Defendants' Exhibit 11—

By Mr. Cohen: Plaintiff's.

By Mr. Mullin:

Q. Pardon me. Yes, referring to Plaintiff's Exhibit 11, is there a Chicago number appearing on that? Do you see one there?

A. No.

Q. Is there a Chicago number appearing on Defendants' Exhibit 6, the book?

A. Yes.

Q. I direct your attention then to this note, the first sentence of the second paragraph of the letter of May 1st. Will you read that, please?

A. If I have to answer that question, picking something out of context, I would rather read the first paragraph, and then the answer will come out correct. If I answer it the way you ask me to, it is going to come out wrong.

By Mr. Mullin: I will withdraw the question.

By Mr. Mullin:

Q. Now I will ask you to read the first paragraph.

262 A. (Reading): "The enclosed copy for the 3 part snap-out forms shows slight changes from our present layout. You will note that the righthand side has a place

for authorizations by the shipper or customer where item is picked up. This is an important feature, as the signature of the sender in the appropriate place will speed payment of many questionable charges such as for instance those where a customer requests pickup at a location other than their own plant and then delivery to a third location and a third party. The upper righthand corner has a place and space allocated for an account number or identification, also an aid in customer identification, such as where customers have similar names, large firms where different departments are using you but are billed separately, out of two charges such as may occur on instruction for pickup on City Messenger Air Express, and other varied situations."

Now, this refers to a three part snap-out form,
263 and it is not—

Q. Yes, I know, I will continue. (Reading):

"You will note that the phone numbers of each city appear. If you wish an additional phone to appear on your Chicago forms you may insert if space permits."

264 Q. And so you authorized the insertion?

A. I didn't authorize anything. I was telling him about the copy here, and if he wanted to make something similar to ours he could.

Q. You didn't object to that?

A. He was using that in Chicago. They were not my forms; they were his forms.

Q. No, I had better clear that up.

If you wished an additional phone to appear—

By the Court: "If" it says?

By Mr. Mullin: It says, "If you wish."

And it says, "you may insert."

By Mr. Mullin:

Q. Doesn't that indicate other phone numbers were to appear, and also a Chicago phone number?

A. I don't know what he was going to order for himself. I didn't see his copies.

Q. Now, I believe you testified on redirect that you had your attorney make a check to see if the names of the Twentieth Century Delivery Service and Cannonball Delivery Service could be used here in the Chicago area when you came here in 1935?

A. Twentieth Century Parcel Service.

265 Q. The Twentieth Century Parcel Service?

A. Yes.

Q. Did you make any check before you opened up your office and came in here under the City Hollywood—City Messenger of Hollywood doing business as City Messenger Air Express?

A. Did I?

Q. Yes, you or your attorney.

A. Yes.

Q. What check did you make?

A. Mr. Mansfield was using the name "City Messenger Company." He had come to Los Angeles in the early part of the war and visited my establishment called "City Messenger."

That must have been prior to the time he opened up, and then he returned to Chicago.

Q. I am referring to the time in January, 1955 when you opened your office here.

A. Yes, Mr. Mansfield was operating the City Messenger. I knew that. It was City Bonded Messenger.

Q. You knew that?

A. Yes, I did.

* * *

18. Additions to and corrections of Appellant's Appendix, page 90.

TESTIMONY OF SIDNEY B. FULLMAN

277 * * * Q. How long have you been associated with the City Messenger of Hollywood?

A. Since 1947, which was the predecessor company, Fullman & Chess, and the corporation since '51, its inception.

By Mr. Mullin: I object to that answer. There has been no chain of title established yet between Fullman & Chess and this plaintiff.

By the Court: Well, it may stand.

If you are going to rely upon that I wish you would connect that chain of title up by some sort of paper.

280 By Mr. Cohen: If your Honor please, I will now introduce into evidence Plaintiff's Exhibit 13.

By Mr. Mullin: Well, I will object to the introduction of this. I don't see any purpose in introducing it. It does not establish any use or chain of title, and in fact all it is is a duplicate affidavit. Where is the original of the affidavit?

I don't know what it proves.

By Mr. Cohen: If your Honor please, this definitely establishes that Sidney Fullman and Samuel Chess published the fact they were operating a business under the fictitious name, the name being City Messenger of Hollywood. That is all this document purports to be.

By Mr. Mullin: It does not purport to prove how they were operating the business.

By the Court: What is the objection?

By Mr. Mullin: The objection is to the introduction of a document which does not prove any use and is not

281 yet established in the chain of title. Even if there were a use there has been no chain of title established.

but the plaintiff or whoever this purports to be—that simply is not shown.

By the Court: Well, I think that is true. I think also that is not—

By Mr. Cohen: This is a notarized document, if your Honor please.

By the Court: It is not the original paper or is not a properly certified copy.

By Mr. Cohen: It is by a notary public. It is signed.

By the Court: Listen, sir, just read it. What is it?

By Mr. Cohen: This is a duplicate affidavit. The original affidavit was filed with the County Clerk on September 30, 1947.

By the Court: Yes.

By Mr. Cohen: And this document carries the signature of Dorothy Redfern, and it is subscribed and sworn to.

By the Court: Now, objection is made to it, and
282 somehow or other I feel I have got to follow the rules of evidence. If copies of that instrument were admissible it would be a copy certified to by the County Clerk.

Objection sustained.

* * *

19. Additions to and corrections of Appellant's Appendix, page 93:

292 * * * By Mr. Cohen: If your Honor please, I will introduce Plaintiff's Exhibit 15 into evidence.

By the Court: Any objection?

By Mr. Mullin: Except for my standing objection about the chain of title—

* * *

20. Additions to and corrections of Appellant's Appendix, page 94:

302 Q. That period of time during your operation did you use any marks, symbols or other media for the advertising of your company?

A. Yes. We used the word in script "City" with a boy, a cartoon character running through the scene, which we used continuously during that time.

By Mr. Cohen: If your Honor please, I will offer Plaintiff's Exhibit 3 in evidence, this being the best possible evidence of this transaction.

By Mr. Mullin: I object, your Honor, on the ground this is an original typewritten document, not an original but what purports to be a copy. It is not even a carbon copy. It is not complete.

I see there are light and dark portions in here. He has not laid the proper groundwork, and I submit if this was a true sale there would have been a carbon copy and he would have had it. He testified the other day he had a personal file in which he kept all these papers, in-
303 cluding newspaper clippings and so forth, and yet he does not have at least a carbon copy.

By the Court: I don't think this paper is admissible. This is the one I have seen before, isn't it?

By Mr. Cohen: It is the one you have seen before, yes.

By the Court: Sustained.

* * *

305 * * * Q. Do you know how soon after the co-partnership transferred that symbol to the corporation the corporation started using such symbol?

* * *

A. Immediately.

By Mr. Mullin: Your Honor, I don't now if you want me to continue to object to the introduction of any of this evidence which predates the actual incorporation of the City Messenger of Hollywood.

By the Court: I want you to try your case. What-
306 ever is necessary for maintaining the rights of your clients, I want you to do.

By Mr. Mullin: That is a continuing objection.

By the Court: I don't know by what means, and counsel has not brought out by what means such rights, if there were any, were transferred to the present plaintiff.

By Mr. Silverman: Your Honor, may I say something?

By the Court: Yes.

By Mr. Silverman: The continuous testimony of this witness has been "We transferred this," or "We transferred that", or "We established that."

By the Court: I understand that.

By Mr. Silverman: It is difficult for us to continuously object, and we presumed a continuous chain of title was to be established here, and it has not been, and consequently we are forced to object until the continuous transfer of the rights has been proven, and it has not.
307 By the Court: I agree with you. You have not shown such change. We don't know. "It just happened" is what this gentleman said, "It just happened."

He has not shown us any papers, agreements, nothing.

By Mr. Cohen: I will ask.

By Mr. Cohen:

Q. Mr. Fullman, on or about what day and what year did the plaintiff corporation start using that particular symbol appearing—

By the Court: Now, you are just assuming it or you are just assuming if they started using it they did own it properly, and therefore ought to have all the rights accrued that anybody else had who had ever used it. That is just not so, and it does not get you anywhere to assume it; it just wastes a lot of time.

By Mr. Cohen: If your Honor please, this is a matter of personal property and, if the Court please, you will also note it involves people who are related, father and son. I have attempted in the best possible way in the
308 limited amount of time I have had to prepare this case—

By the Court: Now, don't talk to me about limited time. Your case was started a year and a half ago. I have explained that to you.

I don't know how this got there. If the corporation issued stock there should be corporate records to show that.

309 By the Witness: There are corporate records, your Honor. The journals of the corporation we have. Would they be acceptable?

By the Court: Corporate records.

By the Witness: We can produce those, your Honor.

By the Court: If this matter had been considered of any value there would have been some papers made up about it, I would think.

By Mr. Cohen: If your Honor please, I will attempt to introduce—I have attempted to introduce Exhibit 3.

By the Court: Exhibit 3 is just a paper an agreeable young lady made up one morning to please this gentleman.

By Mr. Cohen: I believe he also testified he saw the original and that the original was executed.

By the Court: I have not seen the original.

By Mr. Cohen: He also testified he does not know where it is, and it is lost.

310 By the Court: It doesn't make Exhibit 3 admissible.

By Mr. Cohen: Further, your Honor please, there was testimony that in 1946 Mr. Ben Fullman employed an advertising agency to develop a trade mark and symbol for

him, and this mark and symbol we are talking about now, the boy running through the letter "C" represents that mark developed at that time.

By the Court: Now, I heard all that. You just get a little something here and then you assume somebody else owns it. I don't know whether you could make a chain of title or not. I don't know whether it makes any difference to you whether you do make a chain of title, or whether it makes any difference to the case or not whether you make a chain of title, but you have not made a chain.

By Mr. Cohen: If your Honor please, at the moment I have not made a chain; I agree with your Honor.

311 If my understanding of the Hanover Star Milling case is correct the ownership of the mark or symbol is not the primary problem when it comes to a matter of use. The question of use and right to use the name and symbol goes to the question of who is first using the symbol in the particular community or area in which the parties are in controversy, so that in essence, if your Honor please, I think the question of the ownership of a name and ownership of a particular symbol is not a question at this particular moment.

By the Court: If it is not then why spend all the time on it?

By Mr. Cohen: If your Honor please, my theory was I would like to establish when the symbol was first established by my client and when the use of the symbol was made and how it came into the Chicago area.

By the Court: It wouldn't do any good unless you show continuous ownership.

21. Additions to and corrections of Appellant's Appendix, page 96:

320 * * * Q. Is this the carbon copy of the letter that was sent?

By the Court: Let me see it.

Is it?

By the Witness: I thought you said, "Let me see it," your Honor. I didn't understand you.

By the Court: He asked you a question: Is that a carbon copy of the letter?

By the Witness: I am looking at it, your Honor.

By the Witness:

A. This is a carbon copy of the letter. However, it bears the signature of my father.

By the Court: What?

By the Witness: This is a carbon copy of the letter
321 I typed. However, it bears the signature of my father, Ben Fullman. I typed this letter, though. I asked him to sign it.

I recall now I asked him to sign it because I didn't know Mr. Mansfield that well.

Is that properly responsive to the question, your Honor?

By the Court: Well, I don't know.

By Mr. Cohen: I will offer Plaintiff's Exhibit 16.

By Mr. Mullin: Your Honor, I will object to that.

By the Court: Let me see it.

By Mr. Mullin: If the Court please, may I direct your attention to the initials "B. F." which appear on the second sheet?

By the Court: Yes.

By Mr. Mullin: He testified that he typed it or something, and somebody else signed it. That would seem to indicate that somebody else, other than Ben Fullman, dictated it.

By the Witness: What do you mean by "seem to indicate"? If you are accusing me of something I want
322 to know what you are accusing me of.

By the Court: What do you contend this tends to prove?

By Mr. Cohen: It only tends to prove that we sent a letter into the Chicago community to Mr. Mansfield on our letterhead. Our letterhead bore the symbol or mark of our company with the word "City" on it with the boy running through the "C", the messenger boy running through the "C".

By the Court: Well, you address him as "City Messenger Service."

By Mr. Cohen: What was that?

By the Court: You address him, "Mr. Irving Mansfield, City Messenger Service, Chicago, Illinois."

By Mr. Cohen: That is right. There is no contention that we didn't.

By the Court: What are you complaining about? Just go ahead.

By Mr. Cohen: We are complaining, if your Honor please, that the defendant corporation is making par-
323 ticular efforts to prevent us from operating our business, City Messenger Air Express, in the Chicago community, preventing us from using the telephone under the name of City Messenger Air Express.

By the Court: Here you indicate it—that is the way you address it.

By Mr. Cohen: That is correct.

By the Court: Way back there in 1951.

By Mr. Cohen: May this letter be received?

By the Court: Any objection?

By Mr. Mullin: Yes. Mr. Sidney Fullman's initials are not "B" in any event, and the testimony he has given does not purport to—

By the Witness: I think you are narrow, counsel. My middle initial is "B".

By Mr. Silverman: Listen to the Judge, please.

324 By Mr. Mullin: He stated, he testified he typed it and he has got an initial B. I don't see what

materiality it has. We will admit there has been correspondence, they sent their correspondence and their letterheads in. I cannot see what bearing that has on the matter. I don't think it should go in. We have the record cluttered up with enough stuff already.

By the Court: I don't see how it helps you.

By Mr. Cohen: I wasn't proposing to introduce it until the Court asked—

By the Court: I wanted to see how you addressed him. That is what I wanted to see.

* * *

22. Additions to and corrections of Appellant's Appendix, page 97:

331 * * * Q. Does City Messenger Air Express—or, I should say, does City Messenger of Hollywood, doing business as City Messenger Air Express, conduct a local delivery and pickup service in any community?

* * *

By the Witness:

A. No.

By Mr. Cohen:

Q. Specifically, does the plaintiff corporation in its air freight forwarding business, do any pickup and delivery in the Chicago community?

332 A. Does City Express—what did he say?

(Whereupon the question was read as above recorded.)

By the Witness:

A. Incidental to a forwarding movement, it will perform pickup and delivery, but it must be in connection with a forwarding movement.

* * *

23. Additions to and corrections of Appellant's Appendix, page 106:

TESTIMONY OF ELIAS MANSFIELD

369 * * * By Mr. Mullin:

Q. Mr. Mansfield, I hand you a five page photostatic copy which purports to be a debtor's petition in
370 the District Court of the United States for the Southern District of California. In the matter of the Modern Delivery Service, a California corporation, doing business as City Messenger & Express Company, City Messenger, filed July 15, 1948, No. 46212-M, and ask you if you recognize that.

A. Yes, I do. These were delivered to me by—rather, I picked these up at the office of the Clerk of the District Court of the United States at Los Angeles, California, Bankruptcy Division, and they prepared these photostats at my request.

By Mr. Mullin: I will offer into evidence Defendants' Exhibit 11.

By the Court: Is there any objection?

By Mr. Cohen: No objection.

By the Court: It may be received.

(Said document, so offered and received in evidence, was marked Defendants' Exhibit 11.)

By the Court: Go ahead.

By Mr. Mullin:

Q. Now, did you check the bankruptcy records at the time that you obtained this photostatic copy of the
371 debtor's petition?

A. Yes, I did.

Q. Do you recall if the debtor here was ever discharged in bankruptcy?

A. Yes, they were.

Q. Do you recall the date they were discharged in bankruptcy?

A. I know it was in 1952. The exact date escapes me. I believe it was January or February of 1952. I am not sure of the day of the month, but I know it was in 1952.

By Mr. Mullin: Your Honor, yesterday I entered into an oral stipulation with the attorney for the plaintiff that the date on which this corporation, this debtor, was discharged was January 9, 1952.

Is that correct, Counsel?

By Mr. Cohen: I don't think we had a stipulation.

By Mr. Mullin: You certainly did.

By Mr. Cohen: I don't recall that I firmly stipulated with counsel here the date he specified to the Court
372 as to the date of discharge, but I personally have no knowledge, nor do my records disclose to me the date of discharge. However, I don't think—the bankruptcy and the date of discharge, I don't believe, are pertinent.

373 By Mr. Mullin: Your Honor, to refresh the recollection of counsel for the plaintiff, I believe I showed him the Dun & Bradstreet report and pointed out the date appearing thereon. On January 9, 1952, the case was closed, the creditors receiving nothing on their claims.

Does that refresh your recollection, counsel?

By Mr. Cohen: I represented to the Court that we discussed this, but I do not recall giving counsel here a firm stipulation that I would agree to that particular date. I don't want to embarrass counsel, yet I honestly can't say that I did firmly stipulate to that date.

However, if your Honor please, neither Modern Delivery Service nor—Modern Delivery Service is not a plaintiff or defendant here.

By the Court: At the moment you say you did not firmly stipulate?

What do you say about it, counsel?

By Mr. Cohen: To the best of my recollection
374 I said I don't know about the date of discharge. Probably that was the date.

By Mr. Mullin: This morning, do you remember a conversation with me where you said, "Why do we have to enter into a written stipulation? We can orally stipulate."?

By Mr. Cohen: I believe I said that but I believe, also, at the same time, you heard one of the officers of the plaintiff corporation raise an objection to my stipulation.

By Mr. Mullin: I didn't stipulate with them. My conversation was not with the officers; it was with you.

By the Court: Well, what is it? Well, is there a stipulation?

By Mr. Cohen: I honestly believe that I have not stipulated.

By the Court: Well, are you stipulating now, in view of what has transpired in the meantime?

By Mr. Cohen: Well, let the stipulation state that based on a report, it would appear that January 9, 375 1952 was the date of discharge of Modern Delivery Service, Inc.

By Mr. Mullin: That is what I had in the written stipulation. Thank you.

That's all.

Cross Examination by Mr. Cohen.

Q. Counsel, this meeting of August 2, 1954, this luncheon meeting, where you and Ben Fullman and his attorney were present, that was a meeting to discuss the possibilities of the parties getting together, is that correct?

A. That is correct.

Q. And—

A. Pardon me, counsel. May I add that it was not so much about getting together as to find some way to get together?

Q. So far as you know, there was no agreement to get together at that point, no agreement existing?

A. No. That would be August.

Q. No agreement that they get together?

A. No, not at the August meeting; no, sir.

Q. Did Mr. Ben Fullman at this meeting occurring sometime in September, 1954, ever say to you that
376 he would have to confer with the other officers of the City Messenger of Hollywood corporation?

A. No, he did not.

Q. Counsel, you are familiar with corporations and how they deal, how they work?

A. Yes, sir.

* * *

24. Additions to and corrections of Appellant's Appendix, pages 110-113, inclusive:

TESTIMONY OF WILLIAM C. SCHELLI

403 By Mr. Mullin:

Q. You say that you did not operate during the war years?

A. That's right. I said that.

By the Court: He started in 1937. Is that it?

By the Witness: That is right, your Honor.

By the Court: What equipment did you have then?

By the Witness: Well, we had four trailers and three tractors and one straight truck.

By Mr. Mullin:

Q. By trailers do you mean these big hauling trailers?

A. Tractor and trailer, that's right. Four trailers, three tractors, and one straight truck.

Q. One straight truck. Did you have any small equipment for special pickup and messenger service?

A. In our business, whether it was special or whether we put it all together on a small truck, and he made
404 the specials.

Q. Now, when somebody called you for messenger service to pick up an envelope and deliver it to somebody in the other part of the city, did you send out a tractor and trailer to pick it up?

A. I never used the word "messenger." We made special delivery, but never as small as an envelope.

Q. Were you ever in the messenger service?

A. I never did an envelope trade or business.

Q. I asked you, were you ever in the messenger service?

A. No.

Q. You were not. Have you ever been engaged in the messenger business?

A. No, sir.

Q. Well, since you have never been engaged in the messenger business, have you ever been in competition with City Bonded Messenger & Trucking Service?

By Mr. Cohen: Objection.

By the Court: He may answer.

By the Witness:

A. When you say "messenger and trucking" I 405 don't know what part you are stipulating or specifying. As far as trucking—

By Mr. Mullin:

Q. I am speaking of the name of the defendant in this lawsuit.

A. When you say "trucking" I could very well easily be a competitor.

Q. Do you know whether or not you were in competition with them?

A. Well, I could.

Q. Answer that yes or no.

A. I can't say. I don't know how broad your statement is.

Q. I am asking you whether or not you were ever in competition with the defendant here. You either know or you don't know. It is either yes or no.

A. I couldn't say for sure. I could have been. I can't say for sure.

Q. Well, then, of your own knowledge you don't know?

A. I cannot tell you for sure.

Q. For how long a period during the war was the City Transit Lines out of business?

A. Well, we were not actually out of business.
406 We closed down for the war effort.

By the Court: When did you close down; tell us that?

By the Witness: Well, I closed down because of the fact I was more—

By the Court: No. Not why; when?

By the Witness: When?

By the Court: Yes.

By the Witness: Ten days after Pearl Harbor.

By the Court: Ten days after Pearl Harbor?

By the Witness: That is right, sir.

By the Court: When was that?

By the Witness: December 7, 1941.

By Mr. Mullin:

Q. And until when?

A. Until ten days after the close of the war.

By the Court: When was that?

By the Witness: Oh, 19— the actual date I don't know.

By the Court: What year?

By the Witness: 1945.

By the Court: What did you do with your trucks?
407 By the Witness: I sold them.

By the Court: What did you do with your trailers?

By the Witness: They were all sold to another company.

By the Court: How old were you then?

By the Witness: Well, in '41 I was 31 years old.

By Mr. Mullin:

Q. Did you have any accounts receivable?

A. Accounts receivable, yes, we did.

Q. What did you do with those?

A. We collected them, and everything was paid off.

Q. And then you sold everything to another company?

A. Sold pieces here and pieces there.

Q. Not all to the same company?

A. No.

By Mr. Mullin: I think he was out of business. * * *.

409 Q. Was there anybody else engaged with you in this business?

A. No, sir, it is an individual company.

Q. Individual?

A. That's right.

Q. Now, this feeder service, will you describe what that is?

A. Well, the feeder service is a service that is rendered to either rail, truck or air lines on a through rate basis. Of course, when the air-line—when we were not being operated there we would charge our local delivery from Gary, Hammond or East Chicago to the air port, but on the motor carrier we are operated on all through rates throughout the United States, and even though they have their I.C.C. authority they do not use it, and we pick up from them, or vice versa pick it up and deliver to them.

Q. Then you are actually a part of the service the railroad renders to its customers, is that what it is?

410 A. That is what it amounts to.

By Mr. Mullin: Then I move to strike the testimony.

By the Court: Well, overruled.

By Mr. Cohen: The allegation made by the defendant here is that he had something very, very valuable in the name of "City Bonded."

By the Court: Are you addressing yourself to the motion? I have ruled.

By Mr. Cohen: I am sorry. • • •

By Mr. Mullin:

Q. Do you know the plaintiff in this case and the officers of the plaintiff, City Messenger of Hollywood, Inc. doing business as City Messenger Air Express?

A. I have met them.

Q. How long have you known them?

A. Not too long.

By the Court: Well, you know, that word "too" used in that sense, I don't know what that means. We better find out more about it. How long have you known them?

By the Witness: Just recently.

416 By the Court: Well, how recently?

By the Witness: Very recently.

By the Court: Well, how recently?

By the Witness: Just the other day.

By the Court: Last week or this week?

By the Witness: This week, sir.

By Mr. Mullin:

Q. Will you tell us how you met the Fullmans this week?

A. Well, I was called and asked—he called and he talked to me and asked me how long I was in business and if I had any interference with our name, City Transit, with any other comapny.

I told him, so far as I was concerned we didn't have too much interference because of the amount of advertisement and amount of people that I know throughout the city in the transportation business that it wouldn't interfere as much.

Q. Well, what do you mean by "the amount of advertising"?

A. Well, I belonged to these clubs so long that my name is practically around the city and I know all the truckers and everybody else, so, naturally, when the name comes up, they refer to me.

417 Q. They know you personally, is that it?

A. That is right.

Q. Your name?

A. That is right, sir.

By the Court: What is your name, sir?

By the Witness: William C. Schelli.

By the Court: Schelli?

By the Witness: Yes.

By Mr. Mullin:

Q. And they know you, then, by the name of William C. Schelli?

A. That is right, sir.

Q. Have you ever notified City Bonded Messenger & Trucking Service that you were using the name City—was that Transit Line—prior to them and ask them to stop?

A. I can't see where the connection of the two names would have any bearing whatsoever. Mine is City Transit Line.

Q. And, of course, your businesses are considerably different too? That was a question.

A. My business is different. The messenger part is different but, when you say, "trucking," we are in trucking and it could be duplicated.

418 Q. That is general trucking, is that what you are talking about?

A. Trucking. We do any type of trucking.

419 Q. Do you have any financial arrangement with the plaintiff in this case?

A. None whatsoever.

Q. Have you ever done any business with them?

A. No, because we have done business with the regular air lines. We don't do hardly any business at all with freight forwarders at the present.

Q. Do you do business with messenger service?

A. Well, we wouldn't have any use for messenger service.

Q. Well, if somebody called you for a messenger service or do they ever call you for messenger service?

A. Oh, I think a few times I received calls and told them to call somebody that specialized, actually, in the package, envelope business and messenger service.

* * *

25. Additions to and corrections of Appellant's Appendix, pages 113-116, inclusive:

TESTIMONY OF SIDNEY B. FULLMAN

420 * * * *Cross Examination by Mr. Mullin.*

Q. On your direct examination, Mr. Fullman, in connection with Plaintiff's Exhibit 14 which comprises this advertisement which appeared in the Los Angeles Herald Express, I believe you said that it had something to do with a ticket service, a ticket delivery.

Can you describe what that service was, or what that ticket delivery was?

A. Well, if you refer specifically to the record, I will be glad to answer you. I don't know if I said that.

Q. Will you tell us what this ticket delivery is that you have here?

A. You mean here (indicating)?

Point it out to me, what you want me to answer. You haven't got anything pointed out to me there. There is nothing sitting on that page.

Q. I am just asking you what your ticket delivery service was.

421 A. Well, that is different. I can answer you.

Q. That is no different than what I asked you in the first place.

A. Our ticket service was a pickup and delivery of theater tickets, sporting events tickets, spectator tickets, various types of entertainment tickets, picking them up and purchasing them for theater goers at the box office and delivering them to their residences and getting paid a fee for performing that service.

This was a messenger service and we found it somewhat acceptable to the business.

Q. Then you went to the theaters or the arenas or the stadiums and purchased the tickets for the customers, is that correct?

A. Only when they requested it. They requested we pick up tickets at a specific theater and we would pick them up for them at the theater, pick them up at the theater and deliver them to them. We would advance the money and then collect it back.

Q. Where were these theaters located?

A. In Los Angeles, California.

422 Q. Well, were they in the downtown district or in the outlying neighborhoods? Where were they located?

A. In Los Angeles, California. Anywhere in Los Angeles, California.

Q. Were any of them in the downtown district?

A. Yes.

Q. Now, you testified that on April 29, 1947 you purchased a customer list from Modern Delivery Service and the right to use the name City Messenger and its identification and mark in the Hollywood area?

A. That is right.

Q. And in such areas where it would not compete with Modern Delivery Service's downtown operations?

A. That is correct.

Q. You don't consider this competing with Modern Delivery Service in the downtown operation?

A. No, I don't.

Q. Well, now, isn't it a fact that this ad was the Modern Delivery Service ad?

A. Is it a fact?

Q. Yes.

A. Thank you for answering.

423 Q. I am asking you.

A. Oh, that is different. No, it is not a fact.

Q. Will you define, then, what Modern Delivery Service's downtown operations would mean geographically?

A. At what particular time?

Q. On June 9, 1947.

A. I couldn't specifically answer that.

Q. I beg your pardon?

A. I couldn't specifically answer that.

Q. Well, I am referring to the time after you purchased this customer list, et cetera.

A. I wasn't connected with that firm at that time.

Q. I beg your pardon?

A. I wasn't connected with Modern Delivery Service at that time. I already stated that.

Q. Yes, but you bought a list from them and you had been connected with them before that.

A. Well, if you want to talk about before that, I will be glad to talk about it.

Q. Mr. Fullman, you are a native of Los Angeles, California, are you?

A. I was born there.

424 Q. You were born there?

A. Yes.

Q. And you have resided there for some time?

A. Yes.

Q. You are familiar with the City of Los Angeles and the environs?

A. Well, the 441 square miles of Los Angeles is pretty difficult to get completely familiar with. I think it is the largest city area in the United States.

Q. Well, reasonably familiar?

A. Well, as well as any citizen can become familiar.

Q. Well, do you know whether Hollywood is a municipality?

A. Well, now, will you define what you mean by "municipality"? Do you mean, is it incorporated or not incorporated; is it unincorporated or is it a suburb?

Q. Is it a city?

A. It was incorporated into the City of Los Angeles in 1909.

Q. Is it part of the City of Los Angeles?

A. The City of Los Angeles surrounds it.

425 Q. Well, now, is it—you say it surrounds it?

A. Yes.

Q. Well, is it part of the City of Los Angeles?

A. It is incorporated within the city limits.

Q. Is it part of the City of Los Angeles?

A. It is within the city limits.

Q. Can you define the boundaries of Hollywood?

A. I would have to have a surveyor's map for that.

Q. Well, just generally, as close as you can.

A. I already stated it is within the city limits.

Q. I know you did, but I am asking you whether you can define approximately the boundaries of Hollywood.

A. Well, being a member of the Hollywood Chamber of Commerce, I would say that Hollywood encompasses any particular territory where Hollywood's influence is felt, but specifically, I could set out the approximate definition of what I, as a citizen of Hollywood, would consider Hollywood.

Q. But there are no definite boundaries to Hollywood?

A. Well, I think—

426 Q. It is what each one thinks it is?

A. I think in the tract information in the City of Los Angeles it is definitely defined.

Q. Well, now, you think. Have you seen it?

A. Yes, I have seen it defined.

Q. You have seen it defined?

A. Yes.

Q. Where have you seen it defined?

A. In the Hall of Records, City of Los Angeles.

427 Q. Where you saw it defined, did that include downtown Los Angeles?

A. No, it didn't, not what is now downtown Los Angeles. Downtown Los Angeles has been increased in area.

Q. Was it downtown in Los Angeles on June 9, 1947?

A. Was what downtown, Los Angeles, on June 9, 1947?

Q. Was this Hollywood a part of Los Angeles downtown on June 9, 1947?

A. No, it wasn't.

Q. Now, you testified that you paid $2,547 for this customer list, name, et cetera; you said you paid that in installments?

A. That is correct.

Q. Who did you pay that to?

A. Modern Delivery Service, Incorporated.

Q. Who was the head of Modern Delivery Service, Incorporated at that time?

A. You mean—which specific office are you referring to?

Q. Who was president?

A. Benjamin Fullman.

Q. How was this paid?

428 A. By check.

Q. It wasn't paid in cash as Ben Fullman testified previously?

A. Well, if you are going to split hairs on what is cash and what is check, why, we can do that. Give me a book and I can read, too.

Q. Will you answer the question?

A. Well, I am not going to be asked to define what is cash and what is check. I paid by check. Is that good enough?

Q. Do you have any of those canceled checks?

A. No, I don't.

Q. Do you not have them available?

A. No.

Q. You stated you had a personal file.

A. That is correct.

Q. But you never retained any?

A. These are partnership checks.

Q. Partnership checks?

A. Yes.

Q. Well, in that personal file you retained a partnership tax return, didn't you?

A. Yes, I did.

Q. Well, didn't you retain these checks, then?

429 A. They were in the partnership file. I think I already stated that.

Q. Were there any vouchers or any record of these payments by check?

A. Well, is this a question?

Q. Well, I think it is.

A. You mean—well, what do you mean by "was there"? What do you mean by "Was there a voucher?" What do you mean by "Was there a voucher?" Do you mean, was one created, was one written? What do you mean?

Q. Are there any records, any documents of this transaction of these payments?

A. Yes, there is.

Q. What are these records or documents?

A. The books of the Fullman and Chess.

Q. Other than the books of Fullman and Chess, are there any other records?

A. There are vouchers.

Q. Are those available to you?

A. I wouldn't know at this particular time. I don't have them with me.

Q. Where are they?

A. I really don't know.

430 Q. Well, now, you were preparing for a trial here, and you knew what was going to take place here.

Didn't you make any effort to make those records available?

A. No one specifically requested them.

Q. Now, this complaint that was filed by City Messenger of Hollywood, Inc., I believe you signed the complaint, is that correct?

A. That is correct.

Q. Now, directing your attention to the allegation numbered 13-C on page 7 of the complaint and disregarding any penciled notes that I may have on there, would you read that, please, to yourself, or aloud, if you like, and tell me if the allegations contained therein—well, you read that first.

A. Well, this is part of C, an allegation—

Q. Yes, 13 in C.

A. Let me read the entire thing, will you, so I can familiarize myself with what you are—

Q. Surely. 13-C is actually—

A. Do you mind if I read this, Mr. Mullin? You said I could.

431 * * * Q. Now, I show you Plaintiff's Exhibit 17 and ask you if the allegations contained therein are based on that Plaintiff's Exhibit 17, identified also as Plaintiff's Exhibit B in that allegation?

A. This is one of the instruments on which the allegation is based.

Q. Is it based on any other instrument?

A. Yes.

Q. What instruments are they?

A. Advertisements, advertisements being advertised in the classified directory published by The Reuben Donnelley Corporation for the Illinois Bell Telephone
432 Company.

Q. Any others?

A. Books being distributed for the City Bonded Messenger & Trucking Service to their customers.

Q. What kind of books?

A. Messenger receipt books.

Q. When were they distributed?

A. Subsequent to January 10, 1955.

Q. Do those receipt books and the Reuben H. Donnelley advertisement bear any advertisement stating that it is a national messenger service in the U. S. A.?

A. Well, that particular one at that particular time, if I could see one—

Q. Well, you are telling me there are books. I am asking you about it now.

A. Yes, there were at that particular time.

Q. On those books?

A. Yes, on the messenger receipt books, there was.

Q. What did it say?

A. Oh, in the exhibit I think it shows exactly what was said, but I took that information from the exhibits that were presented to me at the time.

433 Q. This information that you have here (indicating)?

A. Yes.

Q. Didn't you, in fact, take it from this (indicating), which is mentioned as Exhibit B here?

A. Well, this is one of the instruments, yes. It is right on here, City Messenger National Credit Card.

Q. That is right. You took it from there?

A. That is one of the instruments I took it from. You specifically mentioned City Messenger credit cards, now. Didn't you mention City Messenger credit cards?

Q. No, I didn't.

A. Well, that is what that refers to in that instrument.

Q. In what instrument?

A. You just pointed it out to me, City Messenger National Credit Card. That is what you pointed out to me.

Q. I asked you about—

A. (Addressing the Reporter): Why don't you find that? Can you read back the question, Miss Clerk, the one just before I answered him. He was trying to
434 refresh my memory. He mentioned City Messenger Credit card.

This is specifically mentioned in the allegation. Anyway, this is one of the instruments on which the allegation was based. They advertised City Messenger National Credit Card as most convenient for charging messenger service at City Messenger offices, whether New York, Hollywood, Beverly Hills or Los Angeles. That

is what it refers to. That is specifically in this allegation.

435 Q. This is what these allegations are based on? I am pointing to Plaintiff's Exhibit 17.

A. You are trying to put words in my mouth, that my whole allegation is based on that. It isn't.

Q. Were there any other documents that are not already in evidence upon which these allegations are based?

A. I believe there are other documents.

Q. Will you name those documents?

A. Well, if I could look through my file, I could find them right now. I have them in my file.

Q. You don't know, offhand?

A. Offhand, I couldn't say.

Q. Do you want to look through your files?

A. Sure.

(Whereupon the witness left the stand and upon his return the following proceedings were had and taken herein:)

By Mr. Mullin:

Q. Did you find any, Mr. Fullman?

A. I did not see any records.

Q. Thank you.

By Mr. Cohen: I am sorry, but I didn't hear the
436 answer.

By the Witness: I did not see any in that thing that I just looked through, in the file. * * *

439 * * * Q. At the time that Modern Delivery Service was bankrupt, did they owe you any money?

A. Yes, they did.

Q. How much?

A. Oh, I can't recall the exact sum. It was in
440 the thousands.

Q. How long had they owed you that?

A. Approximately six months.

Q. Six months, and for what did they owe you that money?

A. Well, specifically for personal loans that I made to the Modern Delivery Service to support their business.

441 By Mr. Mullin:

Q. Well, then, was that before or after you left them that you made those loans?

A. These were made after I left them.

Q. After you left them—

A. Yes.

Q. you made loans to them?

A. Yes.

Q. Did you attempt to make any offset against those loans of this $2,547 that you paid them?

A. Never got the opportunity.

Q. Now these rate chart folders I just showed you, Plaintiff's Exhibit 17, where did you say you received them, or first saw them?

A. I picked that up in the home of Rose Siegal in Chicago up on Margate Terrace. I was staying with her at that time, and she worked for Mr. Mansfield.

Q. Was that the only time you had seen it?

A. I saw another copy of it in my telephone answering service. She got a copy, she received it in the mail and she showed it to me.

Q. Do you know what date she received it?

A. No, I can't fix that date. I saw it, and she
442 had showed it to me.

By Mr. Mullin: I see.

Will the reporter mark this Defendants' Exhibit 12?

(Thereupon said document was marked Defendants' Exhibit 12 for identification.)

By Mr. Mullin:

Q. I will show you Defendants' Exhibit 12 for identification and ask you if you have ever seen those.

A. Not these particular colored ones.

Q. Well, did you see one in any other color that had the same information on it?

A. You just showed me an identical one—well, not an identical one, but a similar one substantially different from these. I don't recall these at all, these particular colored ones. I have never seen a red one or green one.

Q. Do you know whether there appears on there any of the information you complained of in your complaint? I am referring to the allegation in 13-C.

A. Yes, there is.

Q. What is it?

A. The mark on here.

443 Q. Outside of that?

A. Another particular "A better standard of messenger service."

Q. Are you complaining of that?

A. Yes.

Q. Well, that is not in your complaint. I asked you if it was in your complaint.

A. They—well, that was borrowed from a particular advertisement that we placed in New York.

Q. Will you listen to the question?

I am asking you if any of the allegations contained in 13-C of your complaint are contained in those folders.

A. I obtained it from that particular information, from that particular folder.

Q. Would you answer my question?

A. I told you I don't recall ever seeing these particular folders.

Q. Will you answer whether or not there was any allegation contained in there?

A. Let me see the allegations and I will be glad to tell you.

(Whereupon Mr. Mullin handed a document to the 444 witness.)

By the Witness:

13?

By Mr. Mullin:

Q. 13-C.

A. You say besides the mark?

Q. Just the allegations contained in 13-C.?

A. Other than the mark I can't see any.

Thank you very much, counsel.

* * *

26. Additions to and corrections of Appellant's Appendix, pages 116-119 incl.:

446 * * * By Mr. Mullin:

Q. Mr. Fullman, in 1951 did you maintain an office or any pickup and delivery service of any kind whatsoever in Chicago?

A. We did not maintain an office here.

Q. Did you maintain any pickup or delivery service?

447 By Mr. Cohen: Objection.

By the Court: He may answer.

By Mr. Cohen: I don't think that was any part of—

By Mr. Mullin: Will you answer?

By the Court: Overruled.

By the Witness:

A. Did we maintain any pickup and delivery, or did we perform any pickup and delivery?

By Mr. Mullin:

Q. Do you understand the question, Mr. Fullman?

A. No, I don't.

Q. Then answer the question as you understand it.

A. As I understand the question it is, did we perform any pickup or delivery service. We performed a special service in the Chicago area in connection with our Los Angeles operation.

Q. What facilities did you have in Chicago for performing the pickup and delivery service?

A. Well, pickup and delivery was ordered by a client inviting us to perform the segmental services in the area. For instance, if they were shipping something
448 to Los Angeles and they wanted us to pick up something, and deliver it in Los Angeles, they would call us by long distance phone, which was usually in connection with a convention or a traveling account executive.

Q. Where was that pickup and delivery performed?

A. The pickup and delivery was performed, was normally performed at a railroad station or air line depot.

Q. In what city?

A. Los Angeles.

Q. Did you perform any pickup and delivery service in Chicago?

A. We didn't perform pickup and delivery ourselves in the Chicago area.

Q. How about 1953?

A. The same situation applied in 1953.

Q. 1952?

A. The same situation applied in 1952.

Q. When was the first time you performed any pickup and delivery service in the Chicago area?

A. Sometime after May 22, 1954.

449 By Mr. Mullin:

Q. Then since May, 1954, May 22, 1954, you have been engaged in pickup and delivery service here in Chicago?

A. That is not correct.

Q. I beg your pardon?

A. That is not correct.

Q. What is correct?

A. We are in the air freight forwarding business in the Chicago area.

Q. You just testified you performed pickup and delivery service here in Chicago, didn't you?

A. That is an incidental service to our air freight forwarding.

Q. That is part of your air freight forwarding service, is that correct?

A. Incidental service.

Q. Is that correct?

A. Yes.

Q. Will you describe what that part of the pickup and delivery service is here in Chicago, or anywhere?

A. The air freight forwarder performs a through service—

Q. I am asking you about the pickup and delivery
450 service. You have already described what your air freight forwarding position is.

A. We pick up at the shipper's store door.

Q. Yes?

A. We also deliver to the store door. The intercity movement is by air and the delivery to his store door or pickup from his store door to the air freight terminal of the air lines is normally performed by surface transportation.

Q. By surface transportation?

A. Yes, sir.

Q. That is a messenger service? A messenger service could perform that transportation, is that correct?

A. Depending upon the type of equipment he maintained.

Q. Do any messenger services perform that type of operation, ground operation of air freight forwarding?

A. Yes, some of them have.

Q. This City Bonded Messenger & Trucking Service, to your knowledge do they perform the ground operation for air freight forwarders?

451 A. They performed it for us.

Q. Do you know whether they performed it for anybody else?

A. At the present time?

Q. Yes, at any time.

A. They performed it for us. I have already stated that.

Q. I will ask you now whether they have performed it for anyone else.

A. Yes, they have.

Q. Do you know for whom?

A. I believe at the present time they performed it or perform it for the Hop Air Freight Commpany.

Q. H-o-p?

A. Correct.

Q. Are they air freight forwarders?

A. Yes, they are.

Q. Do you know of the Emery Air Freight Forwarding Service?

A. I have heard of them.

Q. Well, this Emery Air Freight Forwarding Service that you have heard of, are they bigger or smaller than you are?

A. I don't understand what you mean, bigger or

452 smaller.

Q. Well, in dollar volume.

A. Yes, they are.

Q. They are much larger than you are.

Do you know whether or not City Bonded Messenger performs any services for ground operations of air freight forwarding for Emery Air Freight Forwarders?

A. I don't know.

Q. The ground operations of air freight forwarding when performed by a messenger service, they require a CAB license?

A. It requires the filing of a contract.

By the Court: It what?

By the Witness: It requires the filing of a contract with the Civil Aeronautics Board.

By Mr. Mullin:

Q. Does it require a letter of authority or license, or whatever you want to call it, from the Civil Aeronautics Board to perform the ground operation?

By Mr. Cohen: Object. I think it is calling for a
453 legal interpretation of what CAB rules and regulations are.

By Mr. Mullin: He is an expert, and he has already testified. He knows about these things.

By Mr. Cohen: He is not a lawyer.

By Mr. Mullin: I am not asking him for that.

454 By the Court: Do you know?

By the Witness: It requires apprising the Civil Aeronautics Board by the parties, by either appearance by both parties before the Civil Aeronautics Board, and explaining the existence of the contract, or a written agreement outlining the charges that they will charge for performance of the services.

By Mr. Mullin:

Q. You testified you had some 350 agents. Now, do these agents perform the ground operations of air freight forwarding for you in these various cities?

A. Yes, they do.

Q. Do you have a contract with each other?

A. Yes, we do.

Q. Have you filed a contract for each one with the CAB?

By Mr. Cohen: Objection.

By the Witness:

A. We have filed a blanket contract listing the agents in that contract.

By Mr. Mullin:

Q. You have listed all 350?

455 A. Yes, we have.

Q. Do you have a copy of that blanket order or whatever you filed with the CAB?

By Mr. Cohen: If your Honor please, I will interpose another objection at this point. The question of what the CAB does and its relation to the plaintiff corporation is not in issue here. The question, the sole question before the Court is whether or not the plaintiff corporation can use the name of City Messenger Air Express and operate in the City of Chicago.

By the Court: What is your question? What is your pending question?

By Mr. Mullin: Whether he has a copy of the blanket order or contract he has filed with the CAB. Now, the issue of the CAB authority has definitely been raised in the complaint of the plaintiff. They have not only raised the issue, but have even cited from the economic regulations of the CAB, and are raising the issue that the

456 defendant has engaged in illegal air freight forwarding. I am trying to establish here—

By the Court: Well, he may answer.

By Mr. Mullin: Thank you, your Honor.

By the Witness:

A. We have a blank form of the contract.

By Mr. Mullin:

Q. A blank form?

A. Of the contract.

Q. Do you have the copy of the written contract?

A. No, I do not.

Q. You do not keep or did not keep a copy of that?

A. We did not have a copy of it?

Q. You did not keep a copy of the one you filed?

A. We say we filed it. It is on file.

Q. Since January 1955 have you engaged in the messenger service in Chicago, in the Chicago area?

A. No.

Q. Are you contemplating engaging in a messenger service in Chicago?

By Mr. Cohen: I will object to that line of questioning.

By the Court: He may answer.

457 By Mr. Cohen: The issue here is do we do business in the area—

By the Court: Find out what you want to.

Objection overruled.

By the Witness:

A. We don't contemplate operating under the name of City Messenger as a messenger.

By the Court: That was not the question.

By the Witness: Do we contemplate entering into a messenger service in any form?

458 By Mr. Mullin: You have answered the question.

By the Witness: I was answering the question his Honor asked me.

May it go into the record?

By Mr. Mullin: I am sorry, your Honor. Did I interrupt?

By Mr. Mullin:

Q. I will show you this—

By Mr. Mullin: I would like to have this marked Defendants' Exhibit 13.

(Thereupon said document was marked Defendants' Exhibit 13 for identification.)

By Mr. Mullin:

Q. I will show you Defendants' Exhibit 13 for identification, which purports to be an application under the

Illinois Motor Carrier Property Act before the Illinois Commerce Commission as a common carrier for general commodities, filed December 6, 1956, and ask you if you recognize that document.

A. Yes, I recognize the document.

Q. And that is an application made in the name
459 of City Messenger of Hollywood, Inc., doing business as City Messenger Air Express?

A. Yes, sir.

Q. The Civil Aeronautics Board letter of authority that you have, does that permit you to engage in the ground operations of air freight forwarding?

A. Incidental to air freight forwarding.

Q. Only incidental to air freight forwarding?

A. As a part of a through air freight movement. If a portion must move by air it is constituted under the authorization of the Civil Aeronautics Board, if a through bill has been issued.

Q. But it does not give you authority to operate as a common carrier in the messenger business in any particular area?

A. You mean as a common carrier ordinarily or as a common carrier surface operation in connection with air freight?

Q. Whatever you understand it to be.

A. It did not give us authority to operate as a surface common carrier in a surface manner, but does as a common carrier in a forwarding operation. We have applied for general trucking rights in the Illinois area, not
460 messenger rights, but general trucking rights.

Q. What do you mean by general trucking rights?

A. It is indicated in the document, I think. May I read the document?

Q. I am asking your recollection.

A. General as listed in the application, general commodities.

Q. And does that general commodities, would that permit you to pick up an envelope and deliver it from one place to another?

A. It would.

* * *

462 * * * By Mr. Mullin:

Q. Now, I believe you testified that an air freight 463 forwarder guarantees or is responsible for air shipments up to—what is it, $300,000.00, or something like that in value? I don't recall exactly.

A. I don't understand your question.

Q. Well, didn't you testify that an air freight forwarder is required to warrant or guarantee against loss any shipment that it handles up to a certain value, I think it was $300,000.00; I am not sure.

A. I don't recall making that particular statement.

Q. Well, do you recall what statement you did make?

A. Yes. An air freight forwarder issues a through bill and is responsible for the shipment from the consignor's door to the consignee's door.

Q. And what happens if a package is lost or damaged? Does the consignor or consignee have a claim against the air freight forwarder?

A. Yes, he does.

Q. And are you required to make good on that?

A. We are required to maintain adequate insurance coverage to assure that the claim will be properly 464 handled and if the people are due damages, why, they will be paid.

Q. And, of course, the Civil Aeronautics Board wouldn't issue a letter of authority except to a responsible applicant, is that correct?

A. That is correct, yes.

Q. A financially responsible applicant?

A. That is correct.

Q. Well, now, isn't it a fact that your financial responsibility is in such question that the United States Government has filed tax liens against you?

By Mr. Cohen: Objection. If your Honor please, a CAB permit has been introduced into evidence and this plaintiff corporation is operating under that CAB permit. I don't think there need be any necessity for going behind the issuance of that permit.

By Mr. Mullin: Well, he has testified—

By the Court: What is the relevance of the question?

By Mr. Mullin: I am attacking the credibility of
465 the witness.

By the Witness: No tax lien has ever been filed against me, personally.

By Mr. Mullin:

Q. I am speaking of City Messenger of Hollywood.

A. Well, make it clear, what you are talking about.

By Mr. Cohen: If your Honor please, I still object to this line of questioning. I don't believe it is pertinent to the issues of the case.

By the Court: What is the relevancy?

By Mr. Mullin: To attack the credibility of the witness, and, also, we have made an allegation in our counterclaim that the defendant has a high reputation for financial responsibility and the use of its name by someone who does not have a high financial responsibility or reputation, certainly goes to the very crux of the issues here involved, as to the unfair competition.

By the Court: Well, if it is necessary you have a right to go into it.

466 By Mr. Mullin: Miss Reporter, will you mark this Defendants' Exhibit 14 for identification?

(Thereupon said document was marked Defendants' Exhibit 14 for identification.)

By Mr. Mullin:

Q. Well, now, do you know of your own knowledge whether a tax lien was ever filed against City Messenger of Hollywood, a corporation, located at 1414 Cole Place, Hollywood 28, California?

A. Possibly.

Q. I hand you Defendants' Exhibit 14 for identification which purports to be a notice of a Federal tax lien under the Internal Revenue laws, 177430, District of Los Angeles, name of taxpayer; City Messenger of Hollywood, a corporation, 1414 Cole Place, Hollywood 28, California, dated October 1, 1956 and filed at the request of the District Director of Internal Revenue on October 8, 1956.

I ask you if you recognize that.

A. I have never seen this document before.

By the Court: I can't hear you.

467 By the Witness:

A. I have never seen this document before.

By Mr. Mullin:

Q. Well, now, if there were a tax lien filed against you, you, as president, would know about it, wouldn't you?

A. Yes, I would.

Q. Well, now, do you know or do you not know whether or not the tax lien was ever filed against you on that date?

A. I don't recall that particular date.

Q. You don't recall?

By the Court: When was the tax lien filed against your company, last fall?

By the Witness: There was one filed. I don't recall the last date, your Honor.

By the Court: Last fall?

By the Witness: That is correct, your Honor.

By the Court: By the United States?

By the Witness: Yes, your Honor.

* * *

27. Additions to and corrections of Appellant's Appendix, pages 120-121:

475 * * * Q. Did you ever purchase any assets of the Modern Delivery Service doing business under all those "City" names from the trustee in bankruptcy after the filing of the bankruptcy?

476 A. No.

* * *

28. Additions to and corrections of Appellant's Appendix, page 121:

480 * * * By Mr. Mullin:

Q. What was the amount of the tax lien that was filed against you?

A. I don't recall exactly.

Q. You don't recall exactly?

A. No, I don't.

Q. Is it the figure that appears on that photostatic copy (indicating)? Is that correct?

A. It could be.

By Mr. Mullin: Let the record show it is $4,964.76.

By Mr. Mullin:

Q. Now, what evidence do you have of the removal of that tax lien?

A. It will be in court tomorrow morning.

Q. I asked you, what evidence do you have?

A. We have a relief from the United States Government.

Q. Are you familiar with the Chicago classified directory? I mean, are you familiar with it as it pertains to your business?

A. Yes.

Q. Do you have a listing under "Messenger Ser-

481 vice" in the Chicago classified directory?

A. We may have.

By the Court: I can't hear you.

By the Witness: We may have, your Honor, I don't specifically know.

By Mr. Mullin:

Q. You don't specifically know?

A. If you will show me the book, I will, probably.

Q. But you are the president of the corporation?

A. Well, this is—

Q. I direct your attention to page 1236 of the Chicago classified telephone directory, December, 1956, and ask you if you find—

A. Yes, I see our ad. We are listed here.

By Mr. Mullin: Is there any objection to this?

By Mr. Cohen: There is no objection.

* * *

482 * * * By Mr. Mullin: I will just read it into the record.

Page 1236 has the following listing:

City Messenger of Hollywood, Inc., 845 South Wabash Avenue, Wabash 2-1850, and that appears under the heading "Messenger and Delivery Service."

* * *

29. Additions to and corrections of Appellant's Appendix, pages 124-125:

TESTIMONY OF WALTER HERMAN BREITBARTH

497 * * * It is your understanding from a Certificate of Public Convenience and Necessity, that this tells you what you can do in your business, is that right?

A. That is right.

Q. And, therefore, you are governed by what you understand this to be?

A. Yes, sir.

Q. There was some kind of a hearing on this certificate of public convenience, wasn't there?

A. Yes, sir.

Q. And as a result of it, there was an order entered by the Illinois Commerce Commission and this came out of it, isn't that right?

A. Yes, sir.

498 Q. Now, you stated in response to the questions put to you by Mr. Cohen, that you read that paragraph which stated what you could carry?

A. Yes, sir.

Q. And he asked you some questions as to whether you thought you could carry an envelope and you said you thought you could. Have you ever carried one?

A. I had no call for it as yet.

Q. You have had no call for envelopes. You don't do messenger service, then, do you?

A. No, sir.

Q. But you did read this list of commodities and you felt that under the term "general cartage" you could carry most anything, isn't that right?

A. That is right.

Q. I want to call your attention to paragraph 6 on page 2 of this particular document and I would like to have you read it aloud so that everybody can hear it.

By the Court: Why don't you read it?

By Mr. Silverman: I will read it. "No. 6: That the Commission finds that the term 'general cartage' as

499 contained in such certificate of public convenience and necessity, is not a commodity description, but rather is service description and that it does not increase the category of commodities specifically mentioned in said certificate."

By Mr. Silverman:

Q. Now, doesn't that tell you that you can't carry anything more than the specific things that you said and that general cartage merely is a designation of the kind of service you are engaged in with respect to these particular commodities? Isn't that what that says?

A. I presume it does.

Q. You have had this certificate for two years, haven't you?

A. Yes, sir.

Q. And you have been carrying, printing machinery—oh, excuse me—shoe machinery and shoe polish and chemicals and I think you decided that you wanted to carry brooms during the time that this was going on, a specific article?

A. Yes.

Q. And you felt that it would be necessary to 500 get permission specifically to carry brooms, is that right?

A. Yes, sir.

Q. So you asked the Commission to put in a special paragraph and that was paragraph—oh, some paragraph in here, isn't that right?

A. Yes.

Q. So, really, your business is very specific, isn't it?

A. Well, according to that, I would say yes.

Q. Now, do you serve any particular industries?

A. I serve the broom business.

Q. The broom business?

A. The shoe machinery business.

* * *

504 * * * Q. Now, Mr. Breitbarth, what do you know about this case, if anything?

A. Well, all I understand is that the name "City" is involved in it and I want to protect my name.

Q. You want to protect your name?

A. My name "City."

Q. Are you represented by an attorney here today?

A. Well, he is the defense over there (indicating).

Q. Who is your attorney?

A. Mr. Cohen, I believe.

Q Mr. Cohen is your attorney?

A. Well, he is today, yes.

Q. When did he get to be your attorney?

A. When the subject came up, I was notified by him about this and I have appeared here voluntarily with this information.

Q. Well, now, at the time he called you he wasn't 505 your attorney, was he?

A. No, sir.

Q. Well, what did he say to you on the telephone?

A. That the name "City" in my name of City Loop was in jeopardy.

Q. He told you that?

A. Yes, sir.

Q. And what did he suggest you do?

A. Appear here as to the extent and the length of time we have had this name, to keep it.

By Mr. Silverman: I am sorry.

Miss Reporter, will you please read the answer of the witness?

(Whereupon the answer was read as above corded.)

By Mr. Silverman:

Q. And when did you appear here first?

A. This morning.

Q. This morning?

A. Yes.

Q. Now, do you know who Irving Mansfield is?

A. Who?

Q. Do you know who Irving Mansfield is?

A. No, sir.

506 Q. Do you know who City Bonded Messenger is?

A. No, sir, except I just heard of their name.

507 Q. You have been in the trucking business for thirty years and you have never heard of City Bonded Messenger Service?

A. No. It never conflicted with my business so I never paid any attention to it.

* * * *

31. Additions to and corrections of Appellant's Appendix, pages 133-4:

TESTIMONY OF BENJAMIN FULLMAN

571 Q. Mr. Fullman, I show you Defendants' Exhibit 16 for identification, comprising inter-house correspondence dated December 13, 1954, from Ben Fullman to Irving Mansfield and ask you if you can identify that.

572 A. Yes.

Q. Can you identify that?

A. Yes.

Q. Is that a letter that you sent to Irving Mansfield on December 13, 1954?

A. It was just a memo.

Q. A memo?

A. Yes.

Q. Now, the subject is mentioned as "Christmas cards." Did you send some Christmas cards along with that? Was that sent in connection with the sending of some Christmas cards?

A. Yes, that is right.

Q. And these are the Christmas cards that you sent?

A. Yes.

By the Court: "These" are what?

By Mr. Mullin: These are the Christmas cards that he sent.

By the Court: "These" is what number?

By Mr. Mullin: Defendants' Exhibit 15. I am sorry. By Mr. Mullin:

Q. Well, now, Mr. Fullman, the Christmas card

573 states: "City Messenger Air Express, Division of City Bonded Messenger Service."

Now, isn't it a fact that you put that on there so that people here in Chicago would identify City Messenger Air Express with City Bonded Messenger Service here in Chicago?

A. No.

574 By Mr. Mullin:

Q. Why did you put that on there?

A. We wanted that sent out to all the people who had used City Messenger, and in printing the thing they were late in being printed, so we sent the printer — he stuck in the word "Bonded." The "Bonded" was no part of our name in New York and no part of our name in Los Angeles, but because of the lateness of the thing, if we had sent them back we would not have had any Christmas cards.

Q. These cards were —

A. Let me finish, please.

Q. Pardon me.

A. The card that we have has a little mark on here where it says "City Messenger Service" and right at the end it says "bonded," letting them know we had a bonded service, but the printer, in printing up the card, stuck it in as part of the name.

Q. Isn't part of your name City Messenger Service of Hollywood, Inc., isn't that the name of your corporation?

A. We were not advertising the name of our corporation. We were advertising City Messenger Service.

575 Q. You put that you were a division or something?

A. City Messenger Service, City Messenger of Hollywood, whichever way you want it. In California and New York we are known as City Messenger.

Q. The printer forgot to put the the "Hollywood, Inc." on there —

A. He wasn't told to put that on; he was told to put "City Messenger Service."

32. Additions to and corrections of Appellant's Appendix, page 137:

TESTIMONY OF IRVING MANSFIELD

599 By Mr. Levin: If the Court please, there is a lot of documentary evidence now being introduced. It is merely accumulative to the point, to show that the name City Bonded Messenger Service has been used since 1943 or 1944. I think they have established that by the great weight of the evidence and it seems to me that a lot of these exhibits are entirely unnecessary.

By the Court: That may be so, but—

By Mr. Levin: I submit to the Court—

By the Court: Are you objecting?

By Mr. Levin: For that purpose, yes. I think we
600 have enough evidence in here to show that.

By the Court: The objection is overruled. There has been a lot of controversy between these folks. The objection is overruled.

33. Additions to and corrections of Appellant's Appendix, page 139:

612 * * * Q. Now, I direct your attention to the fact that you say you are enclosing a new rate chart, and the answer you read discusses a brochure.

613 A. That is right.

Q. Can you explain that?

A. In our business a rate chart and a brochure is one and the same, and always has been.

Q. Do you know what rate chart and what brochure is referred to in that?

A. This one here, the one like you have in your hand.

Q. Defendants' Exhibit 42?

A. That's right.

* * *

34. Additions to and corrections of Appellant's Appendix, page 142:

621 * * * Q. Now, at the time that you adopted the name of City Bonded Messenger Service, I believe that was your first name in 1942 or 1943, how did you select that name?

By Mr. Cohen: Objection.

By the Court: He may state it.

By the Witness:

A. Well, that was the name when I was connected with Cannonball. When I was connected with Cannonball, at the time, we were in a little trouble with the bankruptcy court. The creditors had thought Cannonball was assets of the Twentieth Century that had gone bankrupt and it looked for a time like the creditors would obtain Cannonball and if they would, why, they would take over.

I talked to Mr. Fullman previously, in 1934, 1935,
622 about the name City. I mentioned that if the creditors gained—would gain hold of City Messenger—I mean, of Cannonball, why, I don't know who would operate it for them because, at that time, I think we were about the only messenger service in Chicago and if they had gained control of it, I was going to open under the name of City Bonded Messenger Service. It so happened that the court allowed us to keep Cannonball.

By Mr. Cohen: If the Court please, I move to strike the entire answer as not being responsive to the question.

By the Court: The objection is overruled.

* * *

35. Additions to and corrections of Appellant's Appendix, page 144:

630 Q. Now, just getting back to this first telephone conversation you had with Mr. Fullman when you

mentioned the fact that there had been this bankruptcy and you didn't see how he could come to Chicago, did he make any reply to that statement by you?

By Mr. Cohen: Objection, if your Honor please. Counsel is leading the witness.

By the Court: No, I don't think so.

By Mr. Mullin: I am asking him if there was any reply.

By the Witness:

A. Yes. When I came back and told him about the bankruptcy he said that he would step down as president and stay in the background in an advisory capacity, and that I could become the president, and he said that Elliott or Sidney or Norvin would also be officers.

* * *

37. Additions to and corrections of Appellant's Appendix, page 146:

637 * * * Q. Did you have any conversations with Ben Fullman concerning the air freight forwarding business and the part that City Bonded Messenger should play in it?

A. Yes. After I returned from Los Angeles I did.

Q. No. I am speaking—

638 A. Pardon me?

Q. —of the period before that.

* * *

Q. I am referring to the period before Labor Day week-end, 1954.

A. Oh, yes. That started in, I think, May of 1954, that we were to handle it at the time and until an agreement was signed and that we reach some agreement whereby we would have fifty per cent of the corporation, that City Bonded Messenger would.

Q. Did you engage in air freight forwarding, then, prior to Labor Day week-end, 1954?

639 A. Yes. We engaged in air freight forwarding from the first day that the certificate was issued. I think that was May or March of 1954.

* * *

38. Additions to and corrections of Appellant's Appendix, page 148:

645 * * * By Mr. Mullin: Now, your Honor, I have discussed this with counsel for the plaintiff and we 646 have agreed to stipulate concerning these listings in the telephone directories rather than trying to introduce the directories themselves.

Let the record show that the first listing in the classified telephone directory of Chicago for City Bonded Messenger Service, 221 North State Street, Randolph 6-6001 was in the March, 1944 issue of the Chicago classified directory.

Thereafter, there were listings continuously for every issue, up to the present date; that beginning with September, 1945, there were advertisements of various sizes appearing both under "Messenger Service" and under "Trucking"—these are called display ads—and there were listings under "Air Freight" beginning in December, 1954;

That the address of City Bonded Messenger Service appeared as 221 North State Street to and including the March, 1946 issue; that beginning with the September, 1946 issue, the address was listed as 217 LaSalle 647 Street;

That this address continued but with the same telephone number until the September, 1951 issue, at which time the address was listed as 193 North LaSalle Street and 227 North Ontario.

* * *

650 * * * Q. For which air freight forwarder do you perform the largest or the most work?

A. I believe that Emery Air Freight are giving us in the neighborhood of around $500 a week business at the present time.

Q. When did you start performing this service for Emery Air Freight?

A. Subsequent to January, 1955, when we severed the relationship with City Messenger Air Express.

Q. Prior to that, had you ever performed any services for Emery Air Freight?

A. We didn't perform any services for them but they had made proposals, they asked to perform services and inasmuch as we were serving and financially associated with City Messenger Air Express, they thought it too dangerous to give us any of their business until
651 January, 1955, and until that time we didn't get any of their business.

By Mr. Cohen: If your Honor please, I will move to strike all the testimony after the words that he didn't perform any services.

By the Court: Well, I don't know where to strike, but the thought may go out, what the Emery men thought. That may go out.

By Mr. Mullin:

Q. Was there any reason given to you by Emery Air Freight for not giving you that business?

By Mr. Cohen: Objection.

By the Court: I guess he may answer that.

By the Witness:

A. Oh, definitely.

By Mr. Cohen: If your Honor please, this would be conversations taking place outside of the presence of the plaintiff.

By the Court: Well, he is out trying to get business and if somebody says, "I won't give you any business as long as you are doing business for so-and-so," that isn't a conversation; that is a fact.

By the Witness: Definitely.

652 I had many meetings with Emery, with Mr. Clear and Mr. Connors. They were very anxious to have us perform the ground operations only when we could sever our connections with City Messenger Air Express and, until then, they never gave us one dollar's worth of business.

* * *

39. Additions to and corrections of Appellant's Appendix, page 149:

656 * * * Q. Now, prior to May, 1954, did you have any charge accounts with any of these companies you just mentioned?

* * *

A. No, we never had any charge accounts—

* * *

A. (Continuing) We didn't have any charge accounts with any of the air lines regarding shipping freight; we didn't have a charge account with Western Union, and I don't believe we had a charge account with Railway Express.

40. Additions to and corrections of Appellant's Appendix, page 152:

679 Q. Then this statement is not true, that he, meaning you, received a telephone call from Mr. E. W. Nissen of the Illinois Bell Telephone Company, advising him that City Messenger Air Express of 845 South Wabash had applied for a listing in the telephone directory?

A. Yes, that is true.

Q. That is true. You were not operating a company under that name, is that correct?

A. That name?

Q. Under the name of City Messenger Air Express?

A. Well, we still had City Messenger Air Express. We were not operating any air freight forwarding, no.

Q. What were the operations of City Messenger Air Express, your company, on January 19, 1955?

A. We performed the ground operations; and still perform the ground operations of air freight.

Q. Then you are advertising yourself as City Messenger Air Express?

A. No, we don't have the title of City Messenger Air Express. There was a listing—

680 Q. Do you have—

By Mr. Mullin: Let him finish his answer.

By the Witness:

A. (Continuing) There was a listing in the book, City Messenger Air Express, and that was still from the time we were in business with the City Messenger Air Express, the Fullmans, and I couldn't take it out at that time.

By Mr. Cohen:

Q. That was Randolph 6-2391?

A. I believe it was, yes.

Q. Was that the telephone number that you earlier testified you secured at Fullman's request?

A. That telephone number was secured at their request, but we received, I would say, ten calls for City Bonded Messenger on that phone to one for City Messenger Air Express.

41. Additions to and corrections of Appellant's Appendix, pages 153-154:

685 • • • By Mr. Cohen:

Q. I will show you Plaintiff's Exhibit 23 for

identification, which is a hand with a ball at the end, being a telephone dialer. Through the word "City" in script is a messenger boy running through the letter "C" and imprinted thereon is City Messenger Air Express, Murray Hill 5-1666.

I will ask you whether or not you recognize that exhibit. I will ask you also to look at the defendants' exhibit, and compare them.

A. Yes, I knew of these.

Q. Weren't they purchased from the Glidden Company at the same time?

686 A. No, they were not.

Q. Directing your attention to Plaintiff's Exhibit 23, when was that purchased, Mr. Mansfield?

A. That was purchased after I had distributed close to 10,000 of these.

Q. What day or month and what year were they purchased?

A. I couldn't tell you the day of the month.

687 By Mr. Cohen:

Q. Directing your attention to Defendants' Exhibit 43, tell me the day or the month and year that that advertising material was purchased.

A. I couldn't tell you the exact month but it was prior to this.

By the Court: "Prior to this", you know—you have to require—

By Mr. Cohen: Plaintiff's Exhibit 23, if your Honor please.

By Mr. Cohen:

Q. You don't know when?

A. No, but it was prior to that.

Q. May I have that?

A. Yes, surely.

Q. But all you know is that it was prior?.

By the Court: Well, he told you he had distributed 10,000, didn't he, of his before the others came out?

By Mr. Cohen:

Q. Did you order these for the City Messenger Air Express?

By Mr. Mullin: What do you mean? I object to "these." What is "these"?

688 By Mr. Cohen: I am sorry, Counsel.

By Mr. Cohen:

Q. Did you order Plaintiff's Exhibit 23 for the plaintiff, from the Glidden Company?

A. No, I did not order them.

Q. Do you know who ordered these?

A. Yes, I do.

Q. Who?

A. Mr. Ben Fullman.

Q. Where is the company located, the Glidden Company?

A. The factory is located in the east somewhere but the representative is here in Chicago.

By Mr. Cohen: If your Honor please, I will introduce in evidence at this time Plaintiff's Exhibit 23 and Plaintiff's Exhibit 22.

By the Court: Any objection?

By Mr. Mullin: No objection.

By the Court: They may be received.

(Said documents, so offered and received in evidence, were marked respectively, Plaintiff's Exhibits 22 and 23.)

689 By Mr. Cohen:

Q. Oh, directing your attention to page 13 of Plaintiff's Exhibit 22, which is a copy of a City Messen-

ger of Hollywood, Inc., doing business as City Messenger Air Express, forwarding air bill bearing number 00021, I ask you whether or not those are the same air bills as the one that you identified as Plaintiff's Exhibit 1.

By Mr. Mullin: Where is Plaintiff's Exhibit 1?

By Mr. Cohen:

Q. I will show you both exhibits.

A. I believe this is the photostatic copy of it, yes.

Q. Now, the copy of the bill that appears in this application was one of 5,000 that you had in your possession while you were associated with City Messenger Air Express; is that not true?

A. I don't know if that is the one. We had 5,000 in our possession.

Q. And they ran from 0001 to 5,000, isn't that correct?

A. I couldn't give you the serial numbers on them, no, sir.

690 Q. Would there be any other way that you would have gotten possession of one of these air bills?

A. Other than—

Q. Any more particularly than this air bill?

A. Other than what?

Q. Other than having them as a result of your association with City Messenger Air Express.

A. No, sir. No, sir.

Q. And these are the same bills that you ordered for City Messenger Air Express in March of 1954, is that right?

A. Yes, sir, they are, sir.

Y. And you ordered them for City Messenger Air Express, is that right?

A. That is right, sir.

Q. And yet you would have us believe that you didn't

know the full meaning of this telegram and I am showing you a copy of Defendants' Exhibit 9.

Yet you would have us believe that you didn't know that when Mr. Ben Fullman sent this telegram to you when he issued City Messenger Air Express that it didn't mean City Messenger of Hollywood, Inc., doing business as City Messenger Air Express?

691 A. Let me see that.

I believe we did not receive the forms until weeks after we received this telegram.

692 Q. But you did say that you ordered them for them and you placed the copy with the company, the Uarco Company, isn't that right?

A. I worked on the copy with Mr. Fullman, yes.

Q. You testified, didn't you, that during the period of time that you were associated with City Messenger Air Express you handled no other account for any other air freight forwarder, is that true?

A. As far as I can recollect, that is so.

Q. And it was during this time that you were working for City Messenger Air Express that you received entreaties from Emery Air Express, isn't that right?

A. Yes, that is true.

Q. And you told them that you couldn't handle their business while you were associated with City Messenger Air Express, isn't that true?

A. No. I told them that I wanted to handle their business. That was part of my operation. Their answer to me was that they couldn't give me that type of business because, originally, I asked them why and they said the original tariff that was filed by City Messenger Air Express was our own tariff and it is "one of the reasons why we couldn't give you the business."

693 By Mr. Cohen: I move that the answer be stricken as not in answer to my question that was before the Court.

By Mr. Mullin: You led the witness into it.

By the Court: Read the question and the answer.

(Whereupon the question and answer were read as above recorded.)

By the Court: Let it stand.

By Mr. Cohen:

Q. Do you have a contract with Emery Air Express now?

A. Yes, we do.

Q. Is that contract on file with the CAB?

A. All of their carriers are under contract, yes.

Q. Is your contract with Emery on file with the CAB?

A. I suppose it is, yes.

Q. You don't know?

A. For sure, I don't, no.

Q. Do you have a contract with Hop Air Freight?

A. Yes.

Q. Is your contract with them on file with the CAB?

694 By Mr. Mullin: I will object to these questions. The witness doesn't know whether they are on file or not. That is up to the licensee to file and not up to him.

By Mr. Silverman: Counsel, why don't you ascertain whose duty it is to file the contract?

By Mr. Cohen: I am waiting for a ruling from the Court.

By the Court: Well, I don't know what the law requires. He may answer it, if he knows.

By Mr. Cohen:

Q. Do you know?

A. Will you repeat the question, please, sir?

Q. Do you know whether or not your contract with Hop Air Freight, with Emery Air Freight, is on file with the CAB?

By the Court: He has answered as to Emery.

By Mr. Cohen:

Q. Well, as to Hop, do you know whether or not your contract is on file?

A. I don't know. That would be up to them to file. I wouldn't know.

• • •

42. Additions to and corrections of Appellant's Appendix, pages 154-155:

696 • • • Q. Now, you never offered any money to file a petition at the CAB, did you, offer any money to the Fullmans?

A. Well, it really didn't require any money to file a certificate with the CAB.

Q. You never offered any money to defray expenses for the filing of the petition, is that true?

A. No, I did not.

Q. You did not offer any money?

A. No, sir.

Q. But you did agree with Ben Fullman, in December of 1953, to handle his business in Chicago, is that true?

A. No, sir, I did not.

Q. Was it March of 1954 that you agreed with him to handle his business in Chicago? I am talking about the City Messenger Air Express business.

A. It was prior to that.

Q. Was it February?

A. It was prior to the CAB permit, when and if he got the CAB permit.

Q. When and if he got the CAB permit, you agreed to handle his work in Chicago?

697 A. No, sir.

Q. No?

A. No, sir, only a partnership basis.

698 Q. What was the month, the day and the year, to the best of your knowledge, that this conversation took place?

A. Well, I think I stated in my testimony that his first call to me was in the early part of 1953, from Los Angeles, long before he ever secured the permit, and it was on that basis that we discussed that if we entered into an agreement, that it would be on a 50-50 basis.

Q. And this was over the telephone?

A. Over the telephone, and I think there is some correspondence to that effect, too.

Q. You say there is some correspondence that he agreed to give you 50 per cent of the City Messenger Air Express business?

A. I don't know if it was that particular phase, but there is correspondence relating to the arrangement.

Q. And is that in evidence, that letter?

A. I did not say it was a letter about the money. I said there was evidence of the correspondence, yes, that has been entered.

Q. What does it say? What does that letter say?

A. It mentions something about agreements.

699 By Mr. Mullin: I will object. It speaks for itself. If you want to refer to anything specific—

By the Court: Sustained.

By Mr. Cohen:

Q. It is true you never contributed any money, is that right, towards City Messenger Air Express?

A. No, that is not so. I am out—

Q. In September—

A. I haven't finished.

Q. In September, 1954, it is true that you went to Los Angeles?

A. I made two trips to Los Angeles; yes, sir.

Q. In September of 1954?

A. Then, yes, and in—

Q. When did you make your first trip?

A. That was the first trip, I think.

Q. And when did you make your second trip in September of 1954?

A. I didn't make a second trip—in December of 1954, December, yes.

Q. In September?

A. No. Just one trip in September.

Q. Just one trip in September?

700 A. Yes.

Q. And you said this was over the Labor Day week-end?

A. That is right, sir.

Q. Describe the office at 1414 Cole Place in Los Angeles.

By Mr. Mullin: Oh, I will object. That is immaterial.

By the Court: Do you thing that is necessary?

By Mr. Cohen: Yes.

By the Court: Why?

By Mr. Cohen: Well, I will withdraw the question.

* * *

43. Additions to and corrections of Appellant's Appendix, pages 156-157:

713 * * * Q. When did you call him on the telephone and tell him you were discontinuing service in Chicago?

A. That was understood when I left Los Angeles
714 when he played back the tape recorder, that we couldn't have a 50 per cent share, and I told him at that time, "Ben, I don't want to represent you or want your name in Chicago in the City Messenger service. It is too conflicting with ours.

Q. But you and the plaintiff corporation are not in conflict in Chicago?

A. Yes, they are performing the same service.

Q. They are performing the same service?

A. Yes, sir, they are.

Q. You say your are in the air freight forwarding business?

A. No, I am not in the air freight forwarding business.

Q. But you say the City Air Express is in the messenger service?

A. Yes, they perform messenger service in Chicago.

Q. They do perform messenger service in Chicago by air freight forwarding?

A. No, not by air freight forwarding.

By Mr. Silverman: Your Honor, I think there is argument here.

715 By the Court: Yes. We don't get anywhere by playing with words. We could do that for another week or two.

By Mr. Cohen: No further cross. Well, just one more —no, I am sorry. Nothing else.

Redirect Examination by Mr. Mullin.

Q. When was the first time you filed under the Assumed Name statute?

A. In 1943 I filed under the name of City Bonded Messenger Service.

Q. Why did you file under the Assumed Name statute in January, 1955?

By Mr. Cohen: Objection.

By Mr. Mullin: That was raised.

By the Court: He may answer.

By Mr. Cohen: If your Honor please, that was not brought out by cross examination. I just confirmed the fact that he did.

By the Court: I think it was. Overruled.

716 By the Witness:

A. I am familiar with the statute, and I knew I had to file an assumed name in the City of Chicago, and inasmuch as we held ourselves out as being City Messenger Air Express in this area here where we were responsible for all bills and everything, on the advice from my counsel he said I should register it under an assumed name.

By Mr. Mullin:

Q. You testified that you formed two separate corporations, rather, that you changed the name of the City Messenger & Trucking Service, Inc. to City Messenger Service, and then formed another corporation and called it City Bonded Trucking Company?

A. City Trucking Company.

Q. Why did you form two separate corporations?

By Mr. Cohen: Objection.

By the Court: Let him answer.

By the Witness:

A. There are two reasons. The main reason was union affiliations. They put pressure to use that as long as both of them were together the messengers would have to join a union. That was the main reason.

717 The second reason was taxwise. My auditors advised me to form two corporations.

718 Q. Now, this telegram, which is Defendants' Exhibit 9, from Ben Fullman to you, stating the CAB

approval was issued to City Messenger Air Express, what, if anything, did that mean to you?

By Mr. Cohen: Objection.

By the Court: What was the question, the last part of your question?

By Mr. Mullin:

Q. What, if anything, was meant when you read this, that registration was approved to City Messenger Air Express?

By the Court: To the witness, you mean?

By Mr. Mullin: Yes.

By the Court: Let me see it.

Now, what was your question?

By Mr. Mullin: My question is, what, if anything, it meant to him, that is, the words saying "Registered and issued to City Messenger Air Express" referring to the letter of authority license.

By the Court: You mean what, City Messenger Air Express on the first line and second line?

By Mr. Mullin: That is right.

719 By the Court: What is meant to Mr. Mansfield?

By Mr. Mullin: Yes.

By the Court: Well, he can tell us what he thought.

What did you think?

By the Witness: I thought the certificate was issued in the name of City Messenger Air Express, and no other name.

By Mr. Mullin: That is all.

* * *

44. Additions to and corrections of Appellant's Appendix, page 158.

TESTIMONY OF NORVIN FULLMAN

723 * * * Q. Do you engage in any messenger service?

A. We do not.

Q. Have you ever engaged in any messenger service in the Chicago area?

A. Not to my recollection. I have only been here since August.

Q. Since August; that is what I am referring to?

A. No.

Q. Now, you filed an application for a certificate of necessity and authority as, I believe it was a common carrier, and you signed the application. Why did you file that application?

By Mr. Cohen: Objection. I think the testimony here is that he didn't sign it, that Sidney Fullman signed it.

By Mr. Mullin: No, it was Norvin Fullman. I don't care. It doesn't make any difference.

By Mr. Silverman: No, it was signed by Norvin.

724 By Mr. Cohen: Then I will withdraw my objection.

By Mr. Mullin: Will you answer the question, please?

By the Witness: Will you repeat that?

(Thereupon the question was read as above recorded.)

By the Witness:

A. That is true and according, I believe, to some of the rulings in the State of Illinois, and the states differ, I was not quite sure about it myself, and we wanted to cover ourselves in any case, because although we are performing our type of service some of those might fall in a different category, although under the CAB it might be correct but it might not be according to what the state would allow.

By Mr. Mullin:

Q. Isn't it a fact that you intended to handle a messenger service here in Chicago and that is why you filed this application?

A. That is not true.

By Mr. Mullin: Will you mark this document Defendants' next exhibit number?

725 (Thereupon said document was marked Defendants' Exhibit 48 for identification.)

726 By Mr. Mullin:

Q. Now, I have here a certified copy of the certificate of authority of City Messenger of Hollywood, Inc., filed February 4, 1955, with the Secretary of State, to operate as a foreign corporation here in the State of Illinois, and the very first purpose or purposes which is mentioned here is:

"A. That said corporation shall primarily engage in a general messenger and delivery service."

A. May I see that, please?

Q. Now, I ask you if that is not your intent and purpose here?

A. No, it is not.

Q. And you say that despite the fact that your certificate of authority states that?

By Mr. Cohen: If your Honor please, I think that is a question or a matter that is before the Court here. The Court will recall we have filed and there has been admitted in evidence the original charter issued from the State of California and I think, on a comparison of the documents, the document that counsel has in his hand
727 at the present time and the charter issued in California, that they were identical powers, and, therefore, I am objecting to any further questioning along that line.

By the Court: No. The objection is overruled.

By Mr. Mullin:

Q. Now, do you know what the first date was that City Messenger of Hollywood, Inc. began to transact business in the State of Illinois?

A. No, I am not sure of that at all. I was not here at the time.

Q. Well, you are secretary and treasurer of the corporation. How long have your been secretary-treasurer of the corporation?

A. I have actually been secretary and treasurer since about—well, just before I went in the Army, in 1951, and then I was in the Service for two years and I turned it over to another person and when I got out of the Service after the war, I was put back as secretary and treasurer.

Q. Well, now, do you know the approximate date, then, when you started here in the Chicago area, to transact business?

728 A. I don't recall that date because I was not in this area at the time.

Q. Well, does the date of January 20, 1955 help you to recall the date that you commenced to transact business here in Illinois?

A. No. I was not here at the time. I was in a different part of the field completely.

By Mr. Mullin: I offer into evidence this certified copy of the certificate of authority to transact business in the state.

By the Court: Yes. When was it filed?

By Mr. Mullin: It was filed February 4, 1955.

By the Court: It may be received.

* * *

45. Additions to and corrections of Appellant's Appendix, page 159:

732 Q. Have you at any time since August, that you know of, since August, since your employment here, at 733 any time received any telephone calls from customers seeking messenger service?

A. Yes, sir.

Q. And what did you do with those calls?

A. We referred them to Cannonball.

Q. And that applies to every time that you received a call?

A. That is right. They probably have gotten quite a few calls from us.

Q. Well, what do they say when they call you, these customers?

A. They have asked if we can make a pickup for them and, of course, we answer, "It is CMAX, City Messenger Air Express," and they say, "Can you make a pickup for me?" And, we say, "To what city is it going to?" And they say, "It is local," and we say, "This is City Messenger Air Express; we are air freight forwarders. Do you have something going out of town?" And they say, "No; it is local," and we say, "Why don't you call Cannonball?" Sometimes they ask for a recommendation and sometimes they hang up.

Q. Isn't is a fact that sometimes they ask if you are City Bonded Messenger & Trucking Service?

734 A. No, not to my knowledge.

By Mr. Mullin: That's all.

* * *

46. Additions to and corrections of Appellant's Appendix, pages 162-164:

TESTIMONY OF ANNE M. LOMBARD MAURICE.

754 Q. Directing your attention to the years 1953 and 1954, do you recall any conversations or were you present at any conversations which took place between Mr. Ben Fullman and Mr. Mansfield?

A. I was present at several conversations. I didn't participate in them, but Mr. Fullman came to the offices of the City Bonded Messenger at 2—at 193 North La Salle Street, in 1953 or 1954, the early part, and they were discussing the business of air freight forwarding.

I mean, the conversation was between the two men, but I was present.

Q. And that was in 1953 or '54?

A. Yes.

Q. Do you recall any conversations which took place in your presence after that?

A. Mr. Ben Fullman came through from Los Angeles, I believe, on his way to Washington with regard to the CAB permit, to gain an approval, which he also discussed with Mr. Mansfield in the office.

Q. Did you overhear any of those conversations?

755 A. Well, verbatim, no. I couldn't repeat their conversation verbatim. It was with regard to this particular subject, approval of the CAB permit, and Mr. Mansfield and he were negotiating for this new air freight business.

Q. Did you overhear these conversations concerning the negotiation with Mr. Mansfield?

A. Partially, yes.

Q. Can you repeat any of the conversations, as much as you can recall?

A. Well, Mr. Fullman was talking—

By Mr. Cohen: May I interrupt just for the purpose of getting the time and place, and date, of each conversation she overheard?

By Mr. Mullin: All right.

By Mr. Mullin:

Q. Let's take the first conversation you overheard and place the date, time and place.

A. I believe it was in March.

Q. Of what year?

A. 1954. He was on his way to Washington. Prior to that he had been in the office and they were discussing things that I didn't participate in, but I was given to

understand by Mr. Mansfield in the presence of Mr.
756 Fullman that this was to be a new corporation.

Q. And do you recall who was to participate in this new corporation?

By Mr. Cohen: Objection.

By Mr. Mullin: She said she heard the conversation.

By the Court: Have her tell all she can remember. Give the time and place and who was present.

By the Witness:

A. Mr. Ben Fullman was in the office discussing the CAB permit, the approval he had hoped to gain when he visited in Washington, and then he was going to New York, and he asked Mr. Mansfield to discuss the accounts and operations of City Bonded Messenger, and that it was very good for us to be performing this ground operation, that our account was so well established, that we had between two and three thousand accounts at that time, and we would fit in perfectly.

I was given to understand at that time that Mr. Mansfield was to be an officer of this new corporation, which was to be a private corporation between the Mansfields and the Fullmans. This was the City Messenger
757 Air Express.

By Mr. Cohen: I move to strike everything after "I was given to understand."

By the Witness: How else do you put it?

By the Court: Madam, how were you given to understand? Did you hear them talking about it?

By the Witness: Yes, definitely.

By the Court: Well, let it stand.

By Mr. Mullin:

Q. What, if anything, occurred in the office after that conversation?

A. Mr. Elliott Fullman came to our offices, and he had space and worked in and out of the office and worked

with our salesman, Mr. Gilbert, getting acquainted, and our Mr. Gilbert took him to see the accounts. They were negotiating and preparing to get this business started, for CMAX.

Q. Directing your attention now to the Labor Day weekend or thereabouts in 1954, do you recall anything that happened during that weekend or just shortly prior thereto?

A. Mr. Mansfield went to Los Angeles.

Q. How do you know that?

758 A. I got his reservations for him. He was going to discuss this with Mr. Ben Fullman, and also to make arrangements with his brother.

By Mr. Cohen: Your Honor, I object.

By the Court: Sustained.

47. Additions to and corrections of Appellant's Appendix, pages 169-170:

TESTIMONY OF ROBERT CHARLES McARTHUR

787 By Mr. Mullin:

Q. Now, you have already identified this as your file of the City Messenger Air Express bills.

A. That is correct.

Q. Of air bills. Now I direct your attention to the first all, dated 9/24/56 showing the insignia "City" with the little boy running through it and the script and "Bonded Messenger", and I ask you is that the bill of the City Messenger Air Express or of City Bonded Messenger Service?

A. City Messenger Air Express.

Q. City Messenger Air Express?

A. What I call now City Messenger Air Express, yes, sir.

Q. What you call City Messenger Air Express?

A. Yes.

Q. That refers to a pickup at the Greyhound Bus Depot?

A. That is correct.

Q. To be delivered to the Admiral Corporation in West Chicago, Illinois?

A. That is correct.

Q. Referring now to this same pickup ticket, dated 9/24/56, what transaction does that represent?

788 A. That is a shipment from the Standard Oil Company in Bangor, Michigan, consigned to the Admiral Corporation in West Chicago, Illinois. The shipment is forwarded in by Greyhound bus from Bangor to Chicago, where the City Messenger picked it up and delivered it to our place in West Chicago.

Q. Is there any particular reason for the use of Greyhound bus?

A. Bangor, Michigan, is an off-line point as far as transportation goes, and due to wanting this to be expedited service going to our plant in order to meet that production it is handled that way.

Q. Did you ever use air freight to make a shipment like that?

A. Not out of Standard Oil in Bangor, Michigan.

Q. Now I direct your attention to the bill No. 45147, dated 10/1/56, referring to the pickup at the LaSalle Street Station for delivery to the Admiral Corporation at 3815 West Armitage, and ask you what transaction is represented by that?

A. That is a shipment from the Formalite Cor-
789 poration, Marshall, Illinois, consigned to our plant here, and it is due to production changes we have to have expedited service, and it is sent in by rail to where the City Messenger picks it up and delivers it to our plant.

Q. Rail express?

A. That is right, rail express.

Q. Do you know the defendant, City Bonded Messenger & Trucking Service, Inc., in this case?

A. Yes.

Q. Have you ever done any business with them?

A. Yes, sir.

Q. Prior to September 24, 1956 did you ever do business with them?

A. It is possible. I don't know. I would have to check my file on the City Bonded first.

Q. Of your own knowledge do you recall?

A. I believe there was, yes, sir.

48. Additions to and corrections of Appellant's Appendix, pages 174-176:

TESTIMONY OF ROSE SIEGEL

810 Q. Now, referring to April, 1954, what, if anything, occurred at that approximate time concerning these parties?

A. April? There were so many things that happened in the course of a day. Do you mean in regard to the possible agreement, or the conversation?

811 Q. Well, anything that occurred that you feel is pertinent to the issues here.

A. I don't know whether it was April or prior to April. The month covered so many—

By the Court: I can't hear you.

By the Witness:

A. The month covered so many things, I don't quite know what you are trying to—

By Mr. Mullin:

Q. Was Mr. Mansfield in the office in April, 1954?

A. Yes, he was.

Q. Was he away from the office for any time during that month?

A. Yes. I believe he took a trip to New York.

Q. Do you know whom he was visiting or who he [illegible] in New York?

A. Yes. He informed us of his whereabouts because we had to know, in case we had some business conversations with him, other than relating to that trip.

Q. And where was he going?

A. To visit the office of the City Messenger of 812 Hollywood in New York City.

By Mr. Cohen: If your Honor please, I think all this testimony should be stricken. It doesn't relate to anything here and it relates to conversations that she had with Mr. Mansfield, out of the presence of the plaintiff.

By Mr. Mullin: She is just testifying as to the facts.

By the Court: Yes. The objection is overruled.

By Mr. Mullin:

Q. What if anything occurred after Mr. Mansfield returned from New York?

A. Well, he — I don't know what he accomplished in New York between —.

By the Court: I can't hear you.

By the Witness:

A. I don't know what he accomplished in New York between the plaintiff — I wasn't there — but we knew there was going to be some agreement between the defendant and the plaintiff concerning the City Messenger air forwarding.

By Mr. Mullin:

Q. How did you know that?

813 By Mr. Cohen: I move that that answer be stricken.

By the Court: Strike it out.

By Mr. Mullin:

Q. I am asking you what occurred in the office after he returned. Just tell us facts.

A. I don't know, sir. There was no definite conversation that I could remember.

Q. I am not talking about conversation.

Well, tell me this: Were there any preparations made for any new type of business?

By Mr. Cohen: Objection. Counsel is leading his witness.

By the Court: That is so. Evidently her recollection is exhausted or she doesn't know.

Was there?

By the Witness: Yes, there was.

By the Court: Well, tell us about it.

By the Witness: He explained the operation —

By the Court: Who?

By the Witness: Mr. Mansfield of City Bonded Messenger explained the operation that we were going to into and —

814 By the Court: What did he say?

By the Witness: He explained the pickups and deliveries that we would handle from the airport and part of the new division that we were going to go into.

By Mr. Mullin:

Q. Do you recall anything further being done?

A. In that month?

Q. Well, any time after he returned from New York?

A. Well, I know there were the printed matter that we ordered and he filled out a sample form for us to follow and instructed us as to the way to handle it and write it up and how to — when the calls were to come in, how we were to handle them from then on, and the pickups and the deliveries on the other end, and how to contact the different agencies that they had set up, to continue with the on deliveries.

Q. Now you referred to some printed forms.

Do you know from whom these printed forms were ordered?

A. Yes, I do.

Q. From whom were they ordered?

A. Uarco.

815 Q. Do you know the name or the title of these printed forms?

A. City Messenger Air—

Q. No.

A. Oh—CMAX. We call them CMAX.

Q. Did the form have any particular name on it? What was it called? How did you refer to it?

A. CMAX air bill.

Q. An air bill?

A. Yes.

Q. I show you Plaintiff's Exhibit—

By Mr. Cohen: 1.

By Mr. Mullin:

Q. Plaintiff's Exhibit 1, and ask you if that is the form that you are referring to.

A. Yes. It looks like it. Yes, I would say it is.

Q. Now, what if any part did you play in the preparation of the forms?

A. In the preparation of them?

Q. Yes.

A. I did not prepare them. I wrote on them, placing orders on them, but I did not help prepare the form itself, so far as the printing.

816 Q. Did you see the copy before this was printed?

A. No, I did not.

817 Q. Now, you testified that you were bookkeeper for the defendant.

Do you know the volume of business that is transacted by City Bonded Messenger, the defendant in this case?

By Mr. Cohen: Objection. That has no relationship to the issues here.

By the Court: Overruled.

By the Witness:

A. The City Bonded Messenger Service?

By Mr. Mullin:

Q. Yes.

A. Yes. It varies from month to month. We have peak months and slow months.

Q. And what is it during a peak month?

A. At that time, $35,000.

By the Court: What time do you mean?

By the Witness: Covering this case.

By the Court: Well, place a time, so I know what you are talking about.

By the Witness: 1954.

By Mr. Mullin:

Q And, during a time other than a peak month?

818 A. About thirty thousand.

Q. About thirty thousand?

A. Yes.

By the Court: When is that? Place a time on it so we know.

By the Witness: Well, you see, certain times of the year, like Christmas and Thanksgiving —

By the Court: I want to know whether you are talking about 1944 or 1956.

By the Witness: 1954, sir.

By the Court: All right, 1954.

What was it in 1956, do you know?

By the Witness: I don't know in 1956. I was not bookkeeper at the time — just until 1955. I took a leave of absence in 1955.

By Mr. Mullin:

Q. Do you know what it was in 1955?

A. In 1955, I would say about thirty-three thousand, thirty-five thousand.

Q. And that is during a peak month?

A. Thirty-five thousand, sometimes more. It is a matter of two or three on each side.

Q. Do you know whether the defendants handle any business for Emery Air Freight Forwarders, whether
819 they handle any business for them?

A. At the present time?

Q. At the present time.

A. Yes, sir.

Q. Do you know when they first began to do business for Emery Air Freight?

A. I don't recall the exact date they started to do business with Emery Air Freight.

Q. You don't recall the exact date?

A. No, I don't.

Q. Would you recall the approximate date?

A. It was some time in 1955.

Q. Some time in 1955?

A. Yes.

Q. Do you recall whether Mr. Mansfield had any dealings with any of the officials of Emery Air Freight in your office?

A. I didn't witness any meetings. All the contact I ever had was phone calls.

Q. Phone calls?

A. That is right, sir.

Q. Were there any phone calls?

A. Yes, I answered a couple.

820 Q. You answered the phone calls?

A. Yes, I did.

Q. And these phone calls were from whom to whom?

A. From some representative from Emery Air Freight. They asked — Mr. Mansfield wasn't in the office at the time and I answered the phone and they asked me if I could quote rates and I told them Mr. Mansfield would be the one to do that, and they left a phone number.

I don't recall the gentleman's name, though, that answered.

Q. What date was that?

By Mr. Cohen: I am sorry, but I can't hear.

By Mr. Mullin:

Q. Will you speak up, please?

A. That was in the spring of 1955.

Q. The spring of 1955?

A. Yes, the early part of 1955.

Q. Do you recall any conversations prior to that, or any phone calls?

A. With Emery Air Freight?

Q. Yes.

A. No. The one I am thinking of was in the early part of 1955. It was warm weather.

821 I would like to correct that statement. I think it was 1954.

Q. It was the spring of 1954?

A. I think so, sir.

822 By Mr. Mullin:

Q. Well, can you search your recollection now and make certain whether it was 1954 or 1955?

A. It was '54.

49. Additions to and corrections of Appellant's Appendix, page 177:

827 A. As was said before, Mr. Mansfield of City Bonded Messenger Service was severing his connections with them, and he asked Mr. Sidney Fullman about paying the bill, and Mr. Sidney Fullman said he didn't like the way the bill was presented, that he would like us to itemize that and put all items on a big sheet, and we don't ordinarily do that in our bookkeeping department, but he proceeded to show us how he wanted it, and it took me six weeks to set it up.

Q. Did you set it up?

A. Yes, it was three months' work and I did it in
828 six weeks.

The Telephone Company had to be called, and they gave me an itemized list of every telephone call, and whether it was collect or not, and where, and we presented it.

Q. Was that presented to the Fullmans?

A. Yes, I believe so.

Q. Do you remember the date it was presented to them?

A. I started working on that. That was about the 6th, and it took me about three weeks thereafter to work on it. He helped me with a few, to show me how to set it up, but an argument happened between Miss Lombard and Mr. Sidney Fullman because he questioned every item that was put on the draft, and there was six months, and sometimes as many as 20 or 25 calls a day, and each one of the calls would have maybe ten to twelve entries, and each one was questioned, and at that rate I thought I would never finish it.

Q. What was represented on this big sheet, do you recall?

A. Yes.

By Mr. Cohen: Objection. She has already testified as to what was on the sheet.

829 By Mr. Mullin: I don't think so.

By Mr. Cohen: Yes, she has.

By the Court: What is your objection?

By Mr. Cohen: That she has already testified.

By the Court: No, she hasn't.

Is there anything else you can tell us about?

By the Witness: On this draft we listed — could I give you an example?

By Mr. Mullin: Yes, you go ahead.

50. Additions to and corrections of Appellant's Appendix, page 179:

833 By Mr. Cohen: If your Honor please, I will plead this matter has been decided in that case, and I certainly think it is imposing upon this Court and confusing all the issues to have any material that is concerned in that matter heard in this case.

By the Court: Your opponent just told me it has [not] been settled. Overruled.

By Mr. Cohen: It has been settled.

By the Court: Overruled.

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51. Additions to and corrections of Appellant's Appendix, pages 179-180:

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834 Q. You say the original was tendered to the plaintiff, the original of this accounting sheet, is that true?

A. As far as I know, yes.

Q. Do you have a copy or do the defendants have a copy of that?

A. Yes. You mean the large graph sheet, or are you referring to each order?

By Mr. Cohen: We never received anything of that nature.

By Mr. Mullin: She has testified.

By Mr. Cohen: She has testified, but we have never received any.

By Mr. Mullin: Your Honor, during the prelim-
835 inary status of this lawsuit we presented a motion for production of certain documents. Some of the documents were produced. This was before Mr. Cohen was in the case. Others were not produced.

836 Rather than delay the trial of the issues here, we went ahead without waiting for production of those

documents. I would like to move now that this document be produced, this work sheet that was furnished to the plaintiff.

By Mr. Cohen: If you Honor please, I find in my record no order upon us to produce the graph sheet that this witness has testified to.

By the Court: Well, I will make one. Produce it.

By Mr. Cohen: Well, let me advise the Court that my clients advise me none was ever tendered to them, and therefore they do not have one.

* * *

52. Additions to and corrections of Appellant's Appendix, page 187:

TESTIMONY OF WILLARD GILBERT

864 * * Q. You say you are familiar with the accounts. Are you familiar with the account of Emery Air Freight?

A. Yes, sir, I am.

Q. Can you tell us something about that account?

A. Well, on the Emery Air Freight—

By Mr. Cohen: Well, if your Honor please, I am going to object. The question of Emery Air Freight is not a question here before the Court.

By Mr. Mullin: We are trying to prove the damages here.

By the Court: The objection is overruled.

* * *

53. Additions to and corrections of Appellant's Appendix, page 189:

* * *

869 * * By Mr. Mullin: The defendants rest, your Honor. At this time, though, I would like to make a motion to be permitted to amend our complaint and counterclaims to conform with the proofs here.

* * *

870 By the Court: What do you have in mind?

By Mr. Mullin: I think we have made out a case of breach of contract. We have a count for fraud and deceit but not for breach of contract and I would like to put in such count.

By the Court: You may have leave.

By Mr. Mullin: Thank you, your Honor.

By the Court: When will you do that?

By Mr. Mullin: I will have that tomorrow.

And Thereupon The Defendants Rested Their Case.

* * *

54. Additions to and corrections of Appellant's Appendix, pages 196-197:

TESTIMONY OF IRVING MANSFIELD

910 By Mr. Mullin:

Q. Mr. Mansfield, you will recall that the rebuttal evidence included the testimony of Mr. Ben Fullman and two letters dated 12/29/54, that is, one, and the other was dated January 6th. The one dated 12/29/54 was addressed to "Dear Ben" and signed "Yours, Irving."

I will show you Defendants' Exhibits 53, 54, 55, 56 and 57 and ask you what they are and the circumstances surrounding or explaining that evidence.

A. Yes, I will explain this.

By Mr. Cohen: Objection, if your Honor please. The instruments will speak for themselves.

By Mr. Mullin: We are not asking him as to the contents of the instruments. We are asking him to explain the circumstances surrounding them.

By the Court: Overruled.

911 By the Witness:

A. I have a check in my hand dated December 27, 1955, made out to the American Air Lines for $239.91. It represents a trip I took to Los Angeles to see the Rose Bowl game in 1955.

By Mr. Mullin:

Q. That is Defendants' Exhibit 55 for identification?

A. I think that is what it is marked.

Q. What is the endorsement on the back?

A. The American Air Lines' endorsement, with my ticket number and my address, 5210 Blackstone, and my telephone number. This evidently is what I was confused with when I said I was out in Los Angeles in 1954. It was in '56, and evidently when talking to my brother we were confused as to this being the date of 1954. In reality it was 1955.

By Mr. Cohen: Your Honor, I will object.

By Mr. Mullin:

Q. You are referring to the Rose Bowl game?

A. Yes.

Q. Which took place when?

A. In January, 1956, and I left the following day.

912 By Mr. Cohen: If your Honor please, I object to this line of questioning. Counsel said he was going to come forth and produce evidence of the December 29th date. This December 27, 1955 is wholly without the scope of this trial.

By the Court: Overruled.

By the Witness: Shall I continue?

By Mr. Mullin:

Q. Yes.

A. (Continuing) This is a check dated October 14, 1954, made out to the United Air Lines for $239.91, and represents a round trip to Los Angeles. They have their endorsement on the back of it, "United Air Lines" with flight 731 to Los Angeles on the 15th of October, 1954. That is the time that we were confused with the time I was out there in Los Angeles and visited Ben at his office and heard the tape recording.

Here is a charge from the Diners' Club or charge from the Ambassador Hotel, October 17, 1954, for $54.00. This is a charge for the House of Murphy in Los Angeles, 913 and another for the Barclay also in Los Angeles, dated 1954.

Q. What month?

A. October, and the first part of November.

This is a check dated in October, 1954, that I made out to myself for $500.00 for this trip, and it was cashed by my brother, and it bears the stamp of the Bank of Los Angeles and the Federal Reserve.

I couldn't find the plane ticket, and so I called up the United Air Lines and gave them the endorsement of the check in October, and this is their letter to me, "Mr. Mansfield, City Messenger Service."

By Mr. Cohen: Your Honor, I will object to this.

By the Court: Sustained.

By Mr. Mullin:

Q. Now, to the best of your recollection will you tell us the date of the second meeting with Ben Fullman at which time you and your brother heard this tape recording you testified to?

A. It would have to be subsequent to October 15th to around November 1 when I was there.

By the Court: You were in error when you placed 914 it at the end of December or first of January?

By the Witness: I was, your Honor, sir.

By Mr. Mullin: That is all, your Honor.

By the Court: Anything else? Any cross?

By Mr. Mullin I will offer these into evidence.

By the Court: They may be received.

By Mr. Cohen: If your Honor please, I will object to the entry of Defendants' Exhibit 53, which purports to be a letter from the United Air Lines.

By the Court: Sustained.

By Mr. Cohen: If your Honor please, I will object to the entry of Defendants' Exhibit 55, which purports to be a check dated December 27, 1955.

By Mr. Mullin: That was offered to show how—

By the Court: Overruled. Exhibits other than the letter may be received.

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WILSHIRE & FAIRFAX
WEST HOLLYWOOD

Dear Irving:-

I have been quite busy attending the the numerous deteils involving the setting up of City Messenger Air Express, but I am hoping to get under way by March 1st. Here is some information I have gathered which is very interesting regarding Air expresss and freight matter handled by Emery Air freight on Oct. 18, 1953 out of Chicago. 59 shipments were shipped out of Chicago having a gross weight of 7690 lbs or an average of 131 lbs each, at the same time 46 shipments were sent to Chicago from NY weighing 3012 lbs for an average of 65 lbs each, and 2 from Los Angeles. which shows that 124 shipments were handled by the Chicago office of Emery from NY and Chicago only. The amount of shipments into Chicago are much greater if you take into consideration the amount of shipment from other cities in various parts of the US, that we eventually will operate from. Have you been doing any preliminary surveys of potential shipments that you can get in Chicago or suburbs? (remember that you can also accept shipments from Indiana or Wisconsin. By the way I am going to arrange with some agent In Miwaukee to accept shipments for delivery to points on our schedule, and have them trucked into Chicago for transhipping. We can pickup shipments any place, (meaning you) as long as part of the movement is by air) Therefor you should have no fear in stepping on the toes of Ill commerce Com.

Note:- Call the office of the various Air Forwarding companies, and get copies of some of the advertising matter they are using in Chicago, also copies of their "Memo tariffs". Forward them to me at your earliest time.

Dont give too much worry about the shipping and consolidating of shipments from Chicago, as I am making up for you a set of Standard operating proceedures, that you will use, I will show your dispatchers how they are to be used, checking airline schedules, and other tricks of the trade that will make the operation profitable for all comcerned.

NOTE:- Please contact the telephone company and have them install a T W X--Teletype machine. This will be absolutley necessary in the operations of your office. Dont delay on this as you will need it as soon as you start operating. We now havemachines in Los Angeles #. 1245 and in NY 1-4165

FILED
MAY 9 - 1957
AT ___ O'CLOCK
ROY H. JOHNSON, CLERK
On the Spot ● On the Dot

Irving Mansfield--page 2

PICKUP ORDERS SNAP OUT FORMS:- Have you got any bids on the pickup orders. If you have checked the prices and they cant be bettered let mw know how many you want? As we are running short of them and we must order. The same for the CUSTOMER BOOKS. The tickets will be the same as per smple, except local phone numbers will be out. Your phone number will appear on the cover. check thos'e prices I left on the books, and let me know how many you want, as we must order on those also.

Have you given any more thought about the method of operational charges for the Air express. I have expressed my thoughts to you on the subject and I would like to know what you would like to do. I have a lot of faith in you, and I am sure that you and I can work to-gether. This Air express deal has a tremendous future. I will give you an example, I attended a hearing of the C.A.B. in Washington DC after I left you, and Mr. Emery of Emery Air Freight testified that his business gross in 1953 was 5½ million dollars, and that his gross for 1954 should be over 6 million dollars. This is a lot of business without a big investment in fixed equipment. There is competition in every line of business, but this is a type of business that every one cant get intc without authority from the C.A.B. This take time-money-effort and reputation. Before one can give you competition he has to go through all the things we went through, plus the fact their competition mustbe open and above board. We have the nucleous with offices in NY-LA-and Chicago. From there on all we have to do is appoint agents in various cities we want to operate from.

I suggest that you mimeo a bunch of the letters that I sent a sample of from Los Angeles office, "TRANSCONTINENTAL STAR SPECIAL AIR EXPRESS." and use them as stuffers in all your bills on the first of the month. Sid claims that he received a bunch of inquiries. This letter will be very useful. If you do this immediatly you can send them out ahead of time, and enclose another copy with the billing. If you have inquiries, quote them rates from the "Specific commodity" tariff, as a sample, if the comodity fits into the catagory. WARNING:- do not accept shipments ahead of time, as we will get into untold trouble

Let me hear from you soon.

Sincerely, Ben

P.S. Thank Nadine for hospitatlity, although I only slept there for a few hours, I sure appreciated her early morning coffee at 5.30 a.m. she is a wonderful girl.

NEW YORK
CHICAGO
LOS ANGELES
HOLLYWOOD
BEVERLY HILLS

City MESSENGER

CITY MESSENGER

DATE 4/3/57

802204

Total Miles | Call No.

SUMMARY OF CHARGES

Cust. ALTSCHUL PRODUCTIONS

Address 2461 W. Peterson
Chicago 45

Messenger No. 2 | Rush Special | Regular | Deferred | Route | B C T

Waiting Time: | OK'ed By

Pick Up From:

Address

Deliver To: WARDS

Address W. CHICAGO AVE
DOWNTOWN 5th fl. Retail

Special Instructions
40#

Received By: A. Merrill

C. O. D.

Messenger Serv.		
Nite ☐ Sun. ☐ Hol. ☐		
Car ☐ Truck ☐		
EXTRA CHARGES		
Waiting Time		
Advances		
Fed. Transportation TAX 3%		
TOTAL CHARGES		

07724

• Denotes Minimum Charge

146 *Defendants' Exhibit 4*

INTER-HOUSE CORRESPONDENCE

USE THIS FORM FOR ALL HOUSE CORRESPONDENCE — WRITE ON ONE SIDE OF PAPER ONLY

Date July 8, 1954

To Irving Mansfield *From* Ben Fullman

Subject: Books for NY and LA

I have lookedover the prospective cover for the receipt books, and find them in order. Be sure that the copy is as I sent you. The Los Angeles covers must have the correct phones, and the New York books the New York phones. To be sure a thorough check should be made of a proof. The cut of the plane circling the globe looks familiar. It looks like some copy we now have in the Queens Long Island directory.

We received several comments from the trade on the Recordak Ad in News Week. I am trying to get the boys to work up some kind of a tie in on this ad. Do you have anything in view. We should be able to cash in on it some way. This ad is also to appear in U S News---Business Week and Fortune Mag.

Your brochure is very clever. It should draw attention. Of course this alone will not bring in business. It is good institutional matter. One must still use other methods of selling to bring in business.

I talked to the boys, and they are sending me from New york the highlights of your conference with them. I will look it over carefully and start matters rolling on this end.

We have put a saleman on the outside here to spend his time exclusivly on CMAX. Sales will start picking up on this end I am sure immediatly. We have not had many inquiries to Chicago as yet, but have had many shipments to Louisville, Cincinatti, Indianapolis. You can rest assured that you will be receving more than your share as soon as we can get our sales program rolling. In September we are going to put on a second salesman. As soon as we can get LA rolling good I am going to get a saleman and an agent started in SF and Oakland bay area district. We now have a delivery agent there. The arrangement of a sales agent and salesman requires some porsonal time of my own, that I cannot spare at present. Of course finances is part of the reason, that is why we must go along slow.

I have a lot of faith in this Air Express project, and the only thing that can hold it back, will be capital. As the boys explained to me, you have contact with such capital. I am sure that as a group we can work to-gether and make a huge success of this project. There is one thing that you can be sure of, and that is, it is not a one man business, and does not require the absolute attention to an individual in priceing waybills, making up drivers commision logs. We are not doing business with 1 and 2 dollar items. The individual units are from 5 to 50 dollars. With an average of better than $20.00. People will squable of pennies when they want a local delivery, and will spend many dollars when it requires shipment by air. The competition is rugged, but at the same time you know your competition, and an individual cannot start in business and nip at your heels.

Get these books rolling, as we need them also.

Regards to Nadine Sincerely yours,

FILED
55C575
MAY 9 - 1957
AT ..... O'CLOCK
ROY H. JOHNSON, CLERK

Plaintiff's Exhibit Defendant's Exhibit Rec'd
in the District Court of the United States, Northern District of Illinois, Eastern Div. PARTNER, J.
vs.
Roy E. Feller - Official Court Reporter

PUT IT IN WRITING WRITTEN MESSAGES SAVE TIME AND AVOID ERRORS

BLACK CAT FORM 316

Plaintiffs
Exhibit
Defendants
Exhibit 1 ( ) Identified
( ) Received
District Court of the United States. BEFORE
District of Illinois, Eastern Division RICHER J.
Amy F. Fuller - Official Court Reporter

FILED
MAY 9 - 1957 55C575
AT ..... O'CLOCK
ROY H. JOHNSON, CLERK

CLASS OF SERVICE

This is a full-rate Telegram or Cablegram unless its deferred character is indicated by a suitable symbol above or preceding the address.

WESTERN UNION

W. P. MARSHALL, PRESIDENT

FX-1201

SYMBOLS

DL = Day Letter
NL = Night Letter
LT = Int'l Letter Telegram
VLT = Int'l Victory Ltr.

The filing time shown in the date line on telegrams and day letters is STANDARD TIME at point of origin. Time of receipt is STANDARD TIME at point of destination

CTB003 DEA072 NOA726 LH581

1957 MAY 10 AM 1 12

L=LLU470 NL PD=WUX TDL HOLLYWOOD CALIF 17=

IRVING MANSFIELD, CITY BONDED MESSENGER=

ML 193 NORTH LA SALLE CHGO=

C.A.B. REGISTRATION APPROVED AND ISSUED TO CITY MESSENGER AIR EXPRESS EFFECTIVE MAY 22 1954. IMPERATIVE RUSH BE PUT ON PRINTING OF WAY BILLS. CONTACT UARCO. HOLD THEM TO PROMISE OF PUTTING RUSH ON THIS ORDER. COPY OF NEW TARRIF WILL BE MAILED YOU IN FEW DAYS=

CITY MESSENGER SERVICE BEN FULLMAN=

THE COMPANY WILL APPRECIATE SUGGESTIONS FROM ITS PATRONS CONCERNING ITS SERVICE

DEFENDANTS' EXHIBIT "7"

UNITED AIR LINES

United Air Lines Building, Chicago 38, Illinois

EXECUTIVE OFFICES

August 23, 1954

Plaintiffs Exhibit / Defendants Exhibit / ( ) Identified ( ) Rec'd
In the District Court of the United States, Northern District of Illinois, Eastern Division
BEFORE
Entered ... Deputy

City Bonded Messenger & Truck Service
193 N. La Salle Street
Chicago, Illinois

Attention: Mr. Irving Mansfield

Gentlemen:

Just recently you agreed to guarantee credit charges for the City Messenger Service of Hollywood dba City Messenger Air Express. To confirm this arrangement, we will appreciate your writing us the following letter signed by an officer of your company:

"United Air Lines, Inc.
5959 S. Cicero Avenue
Chicago 38, Illinois

Attention: Mr. C. H. Cuny,
Credit Manager

Gentlemen:

FILED
5 SC 5-75
MAY 9 - 1957
AT ..... O'CLOCK
ROY H. JOHNSON, CLERK

The City Bonded Messenger & Truck Service incorporated under the laws of the state of guarantees all charges as accrued by the City Messenger Service of Hollywood dba City Messenger Air Express incorporated under the laws of the state of .

City Bonded Messenger & Truck Service agrees to make reimbursement to United Air Lines for charges unpaid by City Messenger Service of Hollywood. United Air Lines agrees to notify City Bonded Messenger and Truck Service at any time a charge is more than sixty days past due at which time reimbursement will be made.

Very truly yours,

CITY BONDED MESSENGER & TRUCK SERVICE

Date
Witness

City Bonded Messenger & Truck Service - 2 August 23, 1954

This guarantee will be adequate for our records.

Very truly yours,

C. H. Cuny
Credit Manager

CHC:abk

150 *Defendants' Exhibit 13 (p. 1)*

Form Ill. C.C. 5-454 (Revised)

File No. 16337 PC

Do not fill in

BEFORE THE ILLINOIS COMMERCE COMMISSION

APPLICATION UNDER THE ILLINOIS MOTOR CARRIER OF PROPERTY ACT

(Read Instructions Following Before Answering)

519-19

I. Application of City Messenger of Hollywood, Inc.
(Name)

D/B/A City Messenger Air Express
(Trade or operating name of applicant)

A corporation organized pursuant

to the laws of the state of California

(see attached for list

of directors and officers--Ex-1)

(State whether an individual, partnership, corporation, association, fiduciary, or other legal entity. If a partnership, give names of all partners. Give name of State in which incorporated if a corporation, and the names and addresses of all directors and officers if a corporation or association.)

ILLINOIS COMMERCE COMMISSION
DEC 8 1956
MOTOR CARRIER OF PROPERTY, DIV.

whose business address is 845 So. Wabash Ave, Chicago, Illinois
(Street) (City) (State)

II. Appropriate authority is applied for to:

_____ continue an operation instituted on *_____; X institute a new operation;

_____ extend an existing operation; _____ change an operation; _____ engage in dual operation.

(Place X in appropriate space to indicate applicable phrase or phrases. If authority is sought to continue an operation, attach an abstract from applicant's records to show actual shipments on and after the date the operation was instituted.* If traffic was interchanged, give only the points at which applicant effected such interchange. Such abstract should show: Date, origin, point, destination point and the commodity*) as a common carrier by motor vehicle, in intrastate
(Common or Contract carrier)

commerce, over irregular routes, in the transportation of
(Regular or Irregular)

General commodities, except commodities in bulk
or those commodities which require special equipment.

(If general commodities, so state, and name exceptions. If any, if specific commodities, name them.)

from Chicago, Illinois and a radius of 50 Miles of and the air
~~between~~ ~~and~~ ~~and~~ ~~and~~ ~~as~~
~~follows~~ ports of Chicago area namely:

The Chicago Midway Airport
62 nd Cicero Ave.
and
The O'Hare International Field
Park Ridge, Illinois

MOTOR CARRIER
NOV 29 1956
OF PROPERTY DIV.

(Give detailed description of routes or territories)

* Applies to continuance on a permanent basis of a present operation by virtue of a grant of temporary authority.

J.M.

EXHIBIT IN QUESTION

DIRECTORS AND OFFICERS
OF APPLICANT CORPORATION

DIRECTORS:

SIDNEY B. FULLMAN	1414 Cole Pl. Hollywood Calif.
ELLIOT S. FULLMAN	203 E. 36th St. New York 16, N. Y.
NORVIN FULLMAN	845 So. Wabash Ave. Chicago, Illinois

OFFICERS:

SIDNEY B. FULLMAN	PRESIDENT
ELLIOT S. FULLMAN	VICE PRESIDENT
NORVIN FULLMAN	SECRETARY-TREASURER

MOTOR CARRIER
NOV 29 1956
OS PROPERTY DIV.
503

III. It is proposed to serve the following intermediate and/or off-route points: _____

50 mile radius of Chicago

air ports

(Intermediate points applies only to regular-route operations)

(Off-route points applies only to regular-route operations of property carriers)

IV. On return trips applicant proposes to:

_____ transport only empty containers or other such incidental facilities used in transporting the commodities specified in this application; _____ furnish no transportation for compensation; _____ transport other commodities, namely:

V. The proposed operation will be: X year-around or _____ seasonal between _____ (Day and month)

approximately _____ (Number) times each _____ (Day, week, month or year); _____ on schedule, _____

not on schedule, _____ on call.

VI. Applicant proposes to use approximately six (6) (Number) motor vehicles in the proposed service described above, of the kind and type described in appendix "A" hereto attached.

VII. A financial statement, showing in detail applicant's current financial condition, is attached hereto as appendix "B".

VIII. The extent, if any, to which applicant is directly or indirectly affiliated with, controlled by or under common control or management with any other carrier subject to The Illinois Motor Carrier of Property Act and/or Interstate Commerce Act, is as follows:

None

(If not applicable, so state. If applicable, give complete details)

IX. A map of the proposed operation, showing also the pertinent portions of applicant's present authority, if any, is attached hereto as Appendix "C".

X. The complete authority, if any, heretofore issued to applicant by the Commission, both as to traffic and routes or territory involved, is reflected by Appendix "D" attached hereto. If none, so state none.

XI. Applicant will introduce approximately 3 (Number) witnesses at the hearing and will require approximately 3 (Number) hours to present evidence.

XII. Applicant understands that the filing of this application does not, in itself, constitute authority to operate.

XIII. (To be filled in if applicant is a non-resident individual, partnership or corporation. See instruction Number 6.) Name and address of designated resident agent in the State of Illinois for services under provisions of Section 24 of the Illinois Motor Carrier of Property Act is designated as follows:

Harry Shane (Name of designated agent)

845 So. Wabash Chicago, Ill. (Address of designated agent)

Name and address of applicant's attorney, if applicant represented by attorney

Alfred L. Roth

188 W. Randolph St.

Chicago, Illinois

City Messenger of Hollywood, Inc. D/B/A City Messengers Air Express

By _____ (Applicant)

sec't. and trea.

OATH

STATE OF Illinois }
County of Cook } ss

I, Norvin E. Fullman, being first duly sworn, depose and say: That I am the sec't. and treasurer of the City Messenger of Hollywood Inc., applicant herein; that I have read the foregoing application and know the contents thereof; and that the contents of the foregoing application are true and correct.

(Title—such as President, partner, owner, etc.) (Name of Applicant)

Norvin E. Fullman
(Signature of Individual) sec't. and treasurer

Subscribed and sworn to before me, a Notary Public, in and for the State and County above named this 31st day of October, 1956.

(SEAL)
My Commission expires June 16, 1958

Alfred L Roth
(Notary Public)

OATH

STATE OF
County of } ss

I, _____, being first duly sworn, depose and say: That I am the _____ of the _____, applicant herein; that I have read the foregoing application and know the contents thereof; and that the contents of the foregoing application are true and correct.

(Title—such as President, partner, owner, etc.) (Name of Applicant)

_____
(Signature of Individual)

Subscribed and sworn to before me, a Notary Public, in and for the State and County above named this _____ day of _____, 195_____.

(SEAL)
My Commission expires _____

_____
(Notary Public)

OATH

STATE OF
County of } ss

I, _____, being first duly sworn, depose and say: That I am the _____ of the _____, applicant herein; that I have read the foregoing application and know the contents thereof; and that the contents of the foregoing application are true and correct.

(Title—such as President, partner, owner, etc.) (Name of Applicant)

_____
(Signature of Individual)

Subscribed and sworn to before me, a Notary Public, in and for the State and County above named this _____ day of _____, 195_____.

(SEAL)
My Commission expires _____

_____
(Notary Public)

OATH

STATE OF
County of } ss

I, _____, being first duly sworn, depose and say: That I am the _____ of the _____, applicant herein; that I have read the foregoing application and know the contents thereof; and that the contents of the foregoing application are true and correct.

(Title—such as President, partner, owner, etc.) (Name of Applicant)

_____
(Signature of Individual)

Subscribed and sworn to before me, a Notary Public, in and for the State and County above named this _____ day of _____, 195_____.

(SEAL)
My Commission expires _____

MOTOR CARRIER
NOV 29 1956
OF PROPERTY DIV.

_____
(Notary Public)

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

C E R T I F I C A T E

Re: 16379-MC

I, FREDERICK B. RESAG, do hereby certify that I am Secretary of the Illinois Commerce Commission of the State of Illinois and keeper of the records of said Commission.

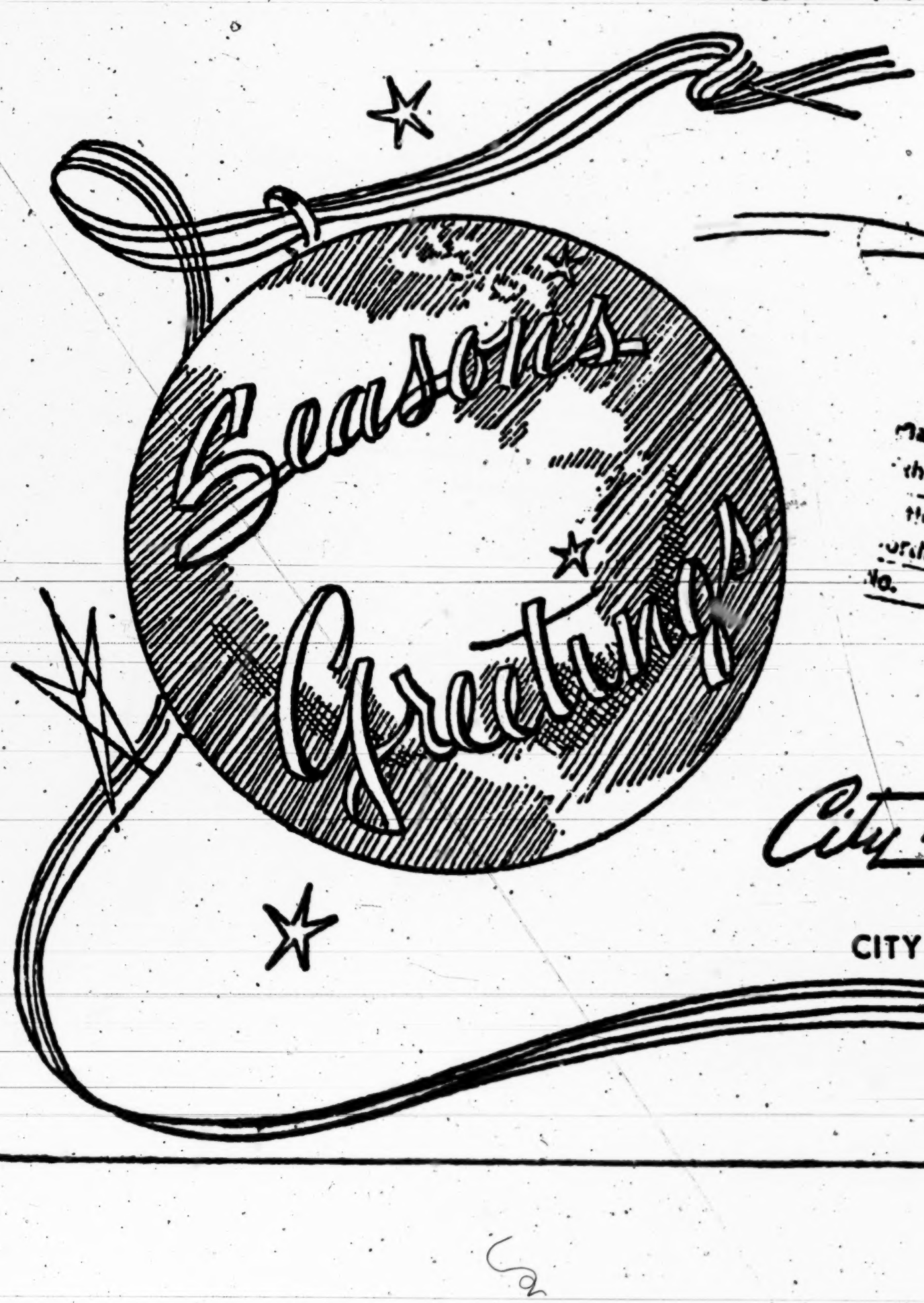
I further certify that the above and foregoing is a true, correct and complete ~~copy of~~ photostatic copy of Application, Exhibit to Question I (2 pages) and Oath on file with this Commission in the above-entitled cause.

Given under my hand and the seal of said Illinois Commerce Commission at Chicago, Illinois, this 21st day of February, 1957.

Frederick B. Resag

FREDERICK B. RESAG

Secretary



FILED
55057
MAY 9 - 1957
O'CLOCK
SON, CLERK

Plaintiffs
Exhibit

Defendants
Exhibit ( ) - 14 Identification
( ) Rec'd

In the District Court of the United States,
Northern District of Illinois, Eastern Division
No.

BEFORE
BARNES, J.

Roy E. Fuller - Official Court Reporter

City MESSENGER AIR EXPRESS

DIVISION OF

CITY BONDED MESSENGER SERVICE

156 *Defendants' Exhibit 47*

SILVERMAN & MULLIN
ATTORNEYS AT LAW
PATENT & TRADE MARK CAUSES
105 W. ADAMS ST
CHICAGO

United States Patent Office

609,732

Registered July 26, 1955

PRINCIPAL REGISTER
Service Mark

Ser. No. 680,867, filed Feb. 1, 1955

Plaintiff's Exhibit — Defendants Exhibit 47 — Rec'd
In the District Court of the United States
Northern District of Illinois, Eastern Div.
No. —
Roy F. Fuller - Official Court Reporter
BEFORE RAPHFR

City BONDED

City Bonded Messenger & Trucking Service, Inc. (Illinois corporation)
193 La Salle St.
Chicago, Ill.

For: MESSENGER DELIVERY SERVICE; SPECIAL DELIVERY OF VARIOUS COMMODITIES—NAMELY, NEWS RELEASES, ADVERTISING COPY, AIR LINE AND RAILROAD TICKETS, RADIO TRANSCRIPTIONS, GRAPHIC ART INDUSTRIES, SAMPLES, AIR FREIGHT, DISPLAYS AND BLOWUPS; DRAYAGE AND GENERAL TRUCKING, HAULING AND MOVING—in CLASS 105.

First used September 1942, and in commerce September 1942.

The word "Bonded" is disclaimed apart from the mark as shown.

55 C 575

FILED
MAY 9 - 1957
AT ..... O'CLOCK
ROY H. JOHNSON, CLERK

Certificate Number 28584

STATE OF ILLINOIS

OFFICE OF THE SECRETARY OF STATE

Plaintiff's Exhibit — Defendant's Exhibit 48 (1-5 Idtfd.) ( ) Rec'd
In the District Court of the United States, Northern District of Illinois, Eastern Division — BEFORE RAPNER, J.
No.
Roy E. Fulle, Official Court Reporter

To all to whom these Presents Shall Come, Greeting:

I, CHARLES F. CARPENTIER, *Secretary of State of the State of Illinois, do hereby certify that the following and hereto attached is a true photostatic copy of* the Certificate of Authority of CITY MESSENGER OF HOLLYWOOD (INC.), filed February 4, 1955.

FILED 55 C 575

MAY 9 - 1957

AT ..... O'CLOCK .....
ROY H. JOHNSON, CLERK

the original of which is now on file and a matter of record in this office.

In Testimony Whereof, *I hereto set my hand and cause to be affixed the Great Seal of the State of Illinois. Done at the City of Springfield this* 25th *day of* February *AD 19* 57

Charles F. Carpentier
SECRETARY OF STATE

Certificate Number 1925

STATE OF ILLINOIS

OFFICE OF THE SECRETARY OF STATE

To all to whom these Presents Shall Come, Greeting:

Whereas,

CITY MESSENGER OF HOLLYWOOD (INC.)

incorporated under the laws of the State of California

has filed in the Office of the Secretary of State duly authenticated evidence of its incorporation and an application for Certificate of Authority to transact business in this State, as provided by "THE BUSINESS CORPORATION ACT" *of Illinois, in force July 13, A. D. 1933.*

Now Therefore, I, CHARLES F. CARPENTIER, *Secretary of State of the State of Illinois, by virtue of the powers and duties vested in me by law, do hereby issue this Certificate of Authority and attach thereto a copy of the application of the aforesaid corporation.*

In Testimony Whereof, *I hereunto set my hand and cause to be affixed the Great Seal of the State of Illinois.*

Done at the City of Springfield this 4th *day of* February *A.D.* 1955 *and of the Independence of the United States the one hundred and* 79th

(SEAL)

Charles F. Carpentier

SECRETARY OF STATE

Date Paid 2-4-55
License Fee $ .84
Franchise Tax $ 15.—
Filing Fee $ 20.—
Penalty $ 3.90
Clerk YC 39.74

Form J
(FILE IN DUPLICATE)

APPLICATION FOR CERTIFICATE OF AUTHORITY OF FOREIGN CORPORATION

Chicago, Illinois
January 31, 1955

To CHARLES F. CARPENTIER, Secretary of State, Springfield, Illinois: 174 45

CITY MESSENGER OF HOLLYWOOD (INC.), a corporation organized and existing under and by virtue of the laws of the State of California, hereby makes application for a certificate of authority to transact business in the State of Illinois and submits the following application pursuant to "The Business Corporation Act," of Illinois:

First—The above corporation was duly incorporated under the laws of the State of California on the 19th day of February, A.D. 19 51, for a term of perpetual years.

Second—The location of the principal office as designated in the charter is 6512 Selma Avenue, Hollywood, Los Angeles County, Cal. The locations of its principal places of business are: 1414 Cole Place, Hollywood, California

Third—The address of the proposed registered office in the State of Illinois will be located at Suite 1532, 33 N. La Salle street in the city of Chicago (2 Zone) Illinois, and the name of its proposed registered agent in this State at such address is: SAMUEL B. BLANKSTEN

PAID
FEB 4 1955
Charles S. Carpentier
Secretary of State

Fourth—The corporation is transacting business and qualified under the foreign corporation laws of the following states and countries other than Illinois:

New York
California

Fifth—The names of its officers and directors and their addresses are as follows:

	NAME	City and State	Street and No.
President	BEN FULLMAN	Hollywood, Cal.	1414 Cole Place
Secretary	BEATRICE M. FULLMAN	Hollywood, Cal.	1414 Cole Place
Director	SIDNEY B. FULLMAN	Chicago, Ill.	845 S. Wabash Ave.
Director	ELLIOT S. FULLMAN	New York, N.Y.	203 E. 36th Street
Director	NORVIN E. FULLMAN.	New York, N.Y.	203 E. 36th Street
Director	BEN FULLMAN	Hollywood, Cal.	1414 Cole Place
Director			
Director			

Sixth—The purpose or purposes for which it was organized which it proposes to pursue in the transaction of business in this State are:

(a) That said corporation shall primarily engage in a general messenger and delivery service.

(b) To purchase, take and lease, exchange or otherwise acquire any real or personal property, rights or privileges convenient for any of the purposes of this business, and to purchase or acquire anything necessary or useful for the conduct of the business as above specified.

(c) To borrow or raise money for any purposes of the company and to secure the same and interest, or for any other purpose, to mortgage all or any part of the property corporeal or incorporeal rights or franchises of this company now owned or hereafter acquired, and to create, issue, draw and accept and negotiate bonds and mortgages, bills of exchange, promissory notes or other obligations or negotiable instruments.

(d) And further to do and perform and cause to be done or performed such, any and all of the acts and things above enumerated and any and all other acts and things insofar as the same may be incidental to or included in any or all of the general powers given, always provided on the grant of the foregoing enumerated powers is upon the express condition precedent, that the various powers as enumerated shall be exercised by the said company only in case the same are authorized to be exercised by the acts above recited under which said company is organized and the same shall be exercised by said company only in the manner and to the extent that the same may be authorized under the said acts above recited under which it was organized.

(e) To enter into, make, perform and carry out contracts of every kind and to engage in any lawful business without limitation or otherwise with any person, firm, association or corporation.

Nothing herein contained shall be deemed to include the discounting of bills and notes or the buying and selling of bills of exchange.

Seventh—The number of shares which it has authority to issue, itemized by classes, par value of shares, shares without par value, and series, if any, within a class, is:

Class	Series (if any)	Number of Shares	Par value per share or statement that shares are without par value
Common	None	100	$100.00 par value per share

Eighth—The number of its issued shares, itemized by classes, par value of shares, shares without par value, and series, if any, within a class, is:

Class	Series (if any)	Number of Shares	Par value per share or statement that shares are without par value
Common	None	100	$100.00 par value per share

(NOTE: "Issued" shares, as used above, include (1) "outstanding" shares, and (2) all shares which have been issued and repurchased or redeemed by the corporation, but not cancelled of record in the home State.)

Ninth—The amount of stated capital and the amount of paid in surplus of the corporation as defined by "The Business Corporation Act" of Illinois, is:

(Note: If no Paid in Surplus, insert "None")

Stated Capital	$ 10,000.00
Paid in Surplus	$ None
Total	$ 10,000.00

*Tenth—Give an estimate of the total value of all the property of the corporation for the following year $ 10,000.00

Eleventh—Give an estimate of the total value of all the property of the corporation for the following year that will be located in Illinois $ 2,000.00

Twelfth—State the estimated total business of the corporation to be transacted by it everywhere for the following year $ 300,000.00

Thirteenth—State the estimated annual business of the corporation to be transacted by it at or from places of business in the State of Illinois $ 50,000.00

Fourteenth—

INTERROGATORIES:

(a) Is the corporation actually transacting business at the present time in the State where it was organized? Yes

(b) From what office will the affairs of the corporation be managed? Hollywood, California

(c) To what office or offices will all contracts with the corporation be forwarded for final acceptance? Hollywood, Cal.

(d) At what office or offices will the directors and stockholders meeting be held? Hollywood, Cal.

(e) The number of shares of all classes owned by residents of Illinois is: Twenty (20)

(f) The number of shares of all classes owned by non-residents of Illinois is: Eighty (80)

(g) Is the corporation transacting business in this State at this time? Yes

(h) If your answer is in the affirmative, state the exact date on which it commenced to transact business in Illinois: 1/20/55

*PROPERTY as used in this application shall apply to all property of the corporation, real, personal, tangible, intangible, or mixed without qualification.

5

IN WITNESS WHEREOF, the undersigned corporation has caused this report to be executed in its name by its President attested by its Secretary, this 31st day of January, A.D. 19 55.

CITY MESSENGER OF HOLLYWOOD (INC.)
(Exact Corporate Title)

By Ben Fullman
President ~~or Vice-President~~

Place (Corporate Seal) Here

Attest: Beatrice M. Fullman
Secretary or Assistant Secretary

STATE OF ILLINOIS }
COUNTY OF COOK } ss.

I, RUTH E. MARSHALL, a Notary Public, do hereby certify that on the 31st day of January, A.D. 19 55, personally appeared before me BEN FULLMAN, who declares he is President of the corporation, executing the foregoing document, and being first duly sworn, acknowledged that he signed the foregoing document in the capacity therein set forth and declared that the statements therein contained are true.

IN WITNESS WHEREOF, I have hereunto set my hand and seal the day and year before written.

Ruth E. Marshall
Notary Public

Place (Notarial Seal) Here

Form J

Box 1026 File 26701

APPLICATION FOR CERTIFICATE OF AUTHORITY OF FOREIGN CORPORATION

CITY MESSENGER OF HOLLYWOOD (INC.)

Note: This form may be used in applying for either an original or an amended certificate of authority. Applications must be accompanied by one copy of the Articles of Incorporation and all amendments duly authenticated by the proper officer of the State or Country [illegible] is incorporated.

FILED

FEB -4 1955

Charles S. [illegible]

[illegible]

(File in Duplicate)

Filing Fee $20.00, plus license fee and franchise tax

Form J (2182—5M—8-54)

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FILED
JUL 21 1958
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, A.D., 1958.

No. 191

CITY BONDED MESSENGER SERVICE, INC., by change of name from CITY BONDED MESSENGER AND TRUCKING SERVICE, INC., an Illinois corporation, and CITY BONDED TRUCKING COMPANY, INC., an Illinois corporation,

Petitioners,

vs.

CITY MESSENGER OF HOLLYWOOD, INC., a California corporation, doing business under the trade name of CITY MESSENGER AIR EXPRESS,

Respondent.

Petition For Writ Of Certiorari.
To The United States Court Of Appeals
For The Seventh Circuit.

ELI MULLIN,
105 W. Adams Street,
Chicago, Illinois,
Attorney for Petitioners.

I. IRVING SILVERMAN,
DAVID D. KAUFMAN,
Of Counsel.

Midwest Law Printing Co., - 326 N. Michigan Ave. Chicago.

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CITATIONS.

Cases:

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The Parkway Baking Company, Inc. v. Freihofer Baking Company, et al., (CA 3) 117 USPQ 426 ..... F. 2d (1958) 7, 10

Gold Seal Company v. Weeks, et al, 129 F. Supp. 928 (D. C. D. C. 1955) 10

Insecto-O Lite Company, Inc. v. Hagemeyer, et al. E. D. Ky. 151 F. S. 829, 834 (1957) 10

Steele v. Bulova Watch Company, Inc., 344 U.S. 280, 283 (1952) 10

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Graver Tank and Manufacturing Company v. Linde Air Products Company, 339 U.S. 605, 612 (1950) 11

Hazeltine Research Inc. v. Avco Manufacturing Corp., (CA 7) 227 F. 2d 137 (1955) 12

Other Authorities:

Section 44(b) of The Lanham Act 15 USC 1126(b) 27a

Section 44(h) of The Lanham Act 15 USC 1126(h) 27a

Section 44(i) of The Lanham Act 15 USC 1126(i) 27a

Section 43(a) of The Lanham Act 15 USC 1125(a) 28a

Rule 52(a) of the Federal Rules of Civil Procedure 28a

Rule 15(b) of the Federal Rules of Civil Procedure 29a

IN THE

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OCTOBER TERM, A.D., 1958.

No.

CITY BONDED MESSENGER SERVICE, INC., by change of name from CITY BONDED MESSENGER AND TRUCKING SERVICE, INC., an Illinois corporation, and CITY BONDED TRUCKING COMPANY, INC., an Illinois corporation,

Petitioners,

vs.

CITY MESSENGER OF HOLLYWOOD, INC., a California corporation, doing business under the trade name of CITY MESSENGER AIR EXPRESS,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit.

The Honorable The Chief Justice and The Associate Justices of The Supreme Court of The United States:

Your Petitioners, City Bonded Messenger Service, Inc., and City Bonded Trucking Company, Inc., pray that a Writ of Certiorari issue to review the judgment of The Court of Appeals for the Seventh Circuit entered in the

above entitled case on January 9, 1958, wherein the Petitioners were the Appellees. A petition for Re-Hearing of the Cause was denied by said Court in a split-decision opinion entered on May 22, 1958.

The judgment was entered upon appeal taken by Respondents from the judgment of the District Court of the United States for The Northern District of Illinois, Eastern Division. The action was originally brought by the respondent, City Messenger of Hollywood, Inc., charging unfair competition against the petitioners and The Illinois Bell Telephone Company and the Reuben H. Donnelley Corporation, as publishers of the telephone directories. The latter two defendants were joined since the questions of telephone listings and numbers were involved by the issues of unfair competition and service mark infringement. The petitioners, City Bonded Messenger Service, Inc., and City Bonded Trucking Company, Inc., counterclaimed for—I. Unfair Competition, II. Fraud and Deceit, III. Service Mark Infringement, and IV. Breach of Contract.

OPINION BELOW.

The oral opinion of the District Court is appended hereto (Appendix, infra, p. 1a), and its Findings of Fact, Conclusions of Law and Judgment Order are likewise appended hereto (Appendix, infra, p. 4a). The opinion of the Court of Appeals is reported at 254 F. 2d 531 (Appendix, infra, p. 16a). The opinion of the Circuit Court on Petition for Re-Hearing is reported at 254 F. 2d 537 (Appendix, infra, p. 25a).

JURISDICTION.

The Judgment of The Court of Appeals was entered January 9, 1958. The timely Petition for Re-Hearing was denied May 22, 1958. The Court of Appeals, on May 26, 1958 and June 20, 1958, entered orders staying the Mandate to permit Petitioners to apply to the Supreme Court for a Writ of Certiorari.

This Court's jurisdiction is invoked under Title 28 USC Section 1254(1) and Rule 19 (1b) of the Rules of the Supreme Court of the United States.

QUESTIONS PRESENTED.

1. Under Section 44 of the Lanham Act (15 USC 1126), does Federal Law govern an action of unfair competition arising out of the infringement of a United States registered trade mark or service mark?

2. Did Section 43(a) of the Lanham Act (15 USC 1125(a)), create a Federal Law of unfair competition?

3. Can a Court of Appeals disregard Rule 52(a) of the Federal Rules of Civil Procedure and, without regard to the Trial Court's specific statement that the Findings of Fact were based upon the credibility of the 22 witnesses who testified during the eight-day trial, and without holding the Trial Court's Findings erroneous, reverse said Findings?

4. Can a Court of Appeals disregard Rule 15(b) of the Federal Rules of Civil Procedure and reverse a judgment on a Count which was added, without objection, to conform to the evidence?

5. Can a Court of Appeals, without restriction, decide issues which were never specifically appealed from?

STATUTES AND RULES INVOLVED.

Sections 44(b), (h) and (i) of the Lanham Act, 15 U.S.C. 1126(b), (h) and (i), (Appendix, infra, p. 27a).

Section 43(a) of the Lanham Act, 15 U.S.C. 1125(a), (Appendix, infra, p. 28a).

Rule 52(a) of the Federal Rules of Civil Procedure (Appendix, infra, p. 28a).

Rule 15(b) of the Federal Rules of Civil Procedure (Appendix, infra, p. 29a).

STATEMENT OF THE CASE.

This case was filed by respondent in the District Court a few days after petitioners had filed an action in the Municipal Court of Chicago, Illinois, to recover for services rendered and monies advanced on behalf of Respondent. The instant action was one in equity for unfair competition which the Trial Court found was totally unfounded, was capricious and vexatious and brought merely for the purpose of harassing petitioners.

The petitioners, since 1942, have engaged in the messenger and trucking business in the Chicago area, including Interstate Commerce, under trade names dominated by the words "CITY", "MESSENGER", and "CITY BONDED MESSENGER". They have continuously, openly and notoriously, used the service mark shown in its U. S. Service Mark Reg. No. 609,732. (Pet. App. p. 156). In 1953, Ben Fullman, then president of respondent, and an old friend of Irving Mansfield, president of petitioners, approached Mansfield, and finally in 1954 induced him to join in a joint venture

with the respondent in an air freight forwarding business which they were just then entering. Prior to that, respondent was a strictly local messenger service in Los Angeles. Relying on Fullman's representation that Mansfield and his Company would be equal partners sharing equally in the profits of this new venture, and further relying on Fullman's statement that a new corporation called "City Messenger Air Express" would be formed which would apply for a Certificate of Authority from the Civil Aeronautics Board and would engage in this business, Petitioners proceeded to do all that was necessary as partners to insure the success of this new venture. Eventually, Ben Fullman and Irving Mansfield met and a contract was entered into wherein petitioners purchased a one-half interest in the new enterprise for Twelve Thousand Five Hundred Dollars ($12,500.00). Notwithstanding the same, respondent repudiated the contract, whereupon petitioners terminated the joint venture. Nevertheless, respondent not only continued to operate an air express business in the Chicago area under the substantially identical trade name and substantially identical service mark, but even went into direct competition with petitioners by engaging in a messenger service and deliberately, wilfully, and unlawfully appropriating messenger business from petitioners' own customers.

After a lengthy trial lasting some eight days in which some twenty-two witnesses testified, Chief Judge Barnes of the District Court denied all relief to respondent, holding that the equities favored petitioners; and clearly indicated in his oral opinion (Appendix, infra, p. 1a) that his decision was based on the credibility of petitioners' witnesses and lack of credibility of respondent's witnesses.

Judge Barnes specifically held that respondent did in fact unfairly compete with petitioners and infringe their

registered service mark. The Court issued an injunction restraining such further activity on the part of the respondent and entered an order in favor of petitioners for treble damages and attorneys fees on the Counts of Unfair Competition and Service Mark Infringement.

At the close of Petitioner's case in the Trial Court, it became evident that the evidence introduced, without objection, proved a breach of contract arising out of the same set of circumstances as Counts I, II and III. The Trial Judge thereupon, in open court, without objection by Respondent, gave leave to petitioners to amend their pleadings to include Count IV for Breach of Contract pursuant to Rule 15(b) of the Federal Rules of Civil Procedure. Respondent, at that time, made no objection to Petitioner's motion for leave to amend, made no request for leave to file an answer thereto, and made no request for a continuance. Despite this apparent consent and waiver, the Court of Appeals, disregarding Rule 15(b), reversed the Trial Court, stating that respondent was entitled to its day in Court.

The Court of Appeals, in reversing the decision in Count I for unfair competition held that the same was governed by Illinois Law which does not provide for treble damages or attorney's fees. As authority for this holding, the Court of Appeals cited a number of its own decisions. The Court then went on to state that the Lanham Act did not change this Rule and cited as authority for this proposition decisions of the Second and Fifth Circuits, and erroneously, one of the Third Circuit.

In so holding, the Court disregarded and failed to comment on the decisions and authorities cited by petitioners which hold that the Lanham Act did in fact create a new substantive Federal Law of unfair competition, and it

erroneously included the Third Circuit case of *L'Aiglon Apparel, Inc.*, v. *Lana Lobell, Inc.*, 214 F. 2d 649, 650, 651, (1954), which actually held that Section 43(a) of the Lanham Act did indeed create a Federal Law of Unfair Competition.(1) In conflict therewith the Court here ruled that the Lanham Act did not create an independent ground for Federal jurisdiction, nor for a claim for damages for unfair competition in the United States between American citizens.

(1) The recent decision of this same Third Circuit Court of Appeals; viz, *The Parkway Baking Company, Inc., et al* v. *Freihofer Baking Company, et al*, 117 USPQ 426, ... F. 2d ....., decided May 21, 1958, confirms

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

The reasons relied on for the issuance of the Writ prayed for are:

I.

Only this Court can resolve the confusion and conflict between the several Circuits concerning the construction of the important Federal Statute 115 USC 1125 and 1126 (Lanham Act Sections 43a and 44). Realizing the salutary corrective effect which uniform control of unfair competition would have on the commercial lifestream of our nation, Congress, in order to avoid the present necessity for resorting to state by state piecemeal litigation, has injected into the Lanham Act a Federal Law of Unfair Competition. The misinterpretation of this Act by some Circuit Courts, including that of the Seventh Circuit, has compounded the uncertainty and confusion in the law which the Act was specifically designed to alleviate. This case presents this Court with an opportunity for resolving the matter.

a. The interpretation of the Federal Statute herein involved is a matter of vital public interest affecting a substantial segment of our population. Representative of many thoughts and comments on this point is the statement by Chief Judge Clark in his concurring opinion in the case of *Maternally Yours, Inc.* v. *Your Maternity Shop, Inc.*, (CA2) 234 F. 2d 538, 547, (1956):

> "—We necessarily have now at least a partial Federal Law of Unfair Competition; we so much need a complete and uniform law to supplement and round out the existing Federal Law of Trade Mark Infringement that we should be astute to avoid this confusing fragmentation of decision wherever we reasonably can."

In the same case, on page 546 Judge Clark said:

> "Indeed there is indication here and elsewhere that the Bar has not yet realized the potential impact of this Statutory Provision."

b. In refusing to apply Federal Law to a Count in unfair competition which arises out of the same set of circumstances as a related count of service mark infringement, the Court of Appeals has construed Section 44 of the Lanham Act contrary to the construction given to that Section by the Court of Appeals for the Ninth Circuit in the line of cases typified by *Stauffer* v. *Exley*, 184 F. 2d 962, (1950), and *Pagliero* v. *Wallace China Company*, 184 F. 2d 339, (1952); and by the Court of Customs and Patent Appeals in the case of *In re Lyndale Farms*, 186 F. 2d 723, (1951). The Court below here cited the case of *American Automobile Association, Inc., et al* v. *Spiegel*, (CA2) 205 F. 2d 771, (1953), as authority that the Court of Appeals for the Second Circuit has likewise construed said Section 44 as not having created a Federal law of unfair competition. A careful reading of that opinion and of the later decision in the case of *Maternally Yours, Inc.*, v. *Your Maternity Shop, Inc.*, (CA2) 234 F. 2d 538, (1956), footnote pp. 546-547, clearly indicates that that Court has in fact not yet squarely decided this issue and that uncertainty and confusion still reigns.

c. In stating that the Lanham Act did not confer Federal jurisdiction over questions of unfair competition, the Court of Appeals has construed Section 43(a) of that Act in direct conflict with several of the other Circuits. Thus, for example, in the case of *L'Aiglon Apparel, Inc.* v. *Lana Lobell, Inc.*, 214 F. 2d 649, (1954), the Court of Appeals for the Third Circuit held that said Section 43(a) is not merely declarative of existing law, but defines a new statutory civil wrong and gives a broad class of suitors in-

jured or likely to be injured by such wrong the right to relief in Federal Court. The Court below erred in citing this case to sustain its position. Again, in the *Maternally Yours* case, the Court of Appeals for the Second Circuit found it unnecessary to decide this issue, but Chief Judge Clark, in his concurring opinion, agreed with the holding of the *L'Aiglon* case and stated that this Section of the Lanham Act did in fact create a Federal Law of Unfair Competition. Additional authorities which support this point of view are: *The Parkway Baking Co., Inc.* v. *Freihofer Buking Co., et al,* (C.A.3) 117 USPQ 426, (1958), ... F. 2d ....; *Gold Seal Company* v. *Weeks, et al,* 129 F. Supp. 928 (D.C.D.C. 1955), affirmed in *S. C. Johnson & Son, Inc.* v. *Gold Seal Company, et al,* 230 F. 2d 832 (D.C. Cir. 1956), cert. den. 352 U.S. 829 (1956); *Insecto-O Lite Company, Inc.* v. *Hagemeyer, et al,* E.D. Ky. 151 F. S. 829, 834, (1957); Callman, False Advertising as a Competitive Tort, 1948, 48 Col. L. Rev. 876, 877-886; Bunn, The National Law of Unfair Competition, 1949, 62 Harv. L. Rev. 987, 998-1000; 39 Corn. L. Q. 351 and 6 Syracuse L. Rev. 200.

II.

This case presents important questions of Federal law which have not been, but which should be, settled by this Court.

a. That there is confusion and conflict of opinion over the meaning of Section 44 of the Lanham Act is evidenced by the above cited decisions of the various circuits. The only known case in which this Court has discussed the problem is *Steele* v. *Bulova Watch Company, Inc.*, 344 U.S. 280, 283, (1952), in which the existence of the problem was

recognized, but its determination was left for a future date. The opportunity for this determination is here presented.

b. This Court has never construed Section 43(a) of the Lanham Act. The existing authorities hold contrary to the instant decision and state that said section did create a Federal Law of Unfair Competition. Only this Court can resolve the conflict between the several Circuits.

III.

The Court below has so far departed from the accepted and usual course of judicial procedure as to call for an exercise of this Court's powers of supervision.

a. The Court of Appeals, in reversing without comment the Trial Court's Findings of Facts, has completely disregarded and emasculated vital Federal Rule of Civil Procedure 52(a). The Trial Judge, in his oral opinion (Appendix infra, p. 1a), specifically stated that his conclusions were based on the oral evidence and his judgment of the credibility of the witnesses, and since the Court of Appeals did not find that the Trial Court's Findings of Fact were clearly erroneous, it committed an error which should be rectified. As a matter of fact, the Court below apparently reversed its position as expressed in the case of *Solar Corporation* v. *Borg-Warner Corporation*, (CA7) 244 F. 2d 940, 941, (1957), and departed from the decision of this Court in *Graver Tank and Manufacturing Co.* v. *Linde Air Products Company*, 339 U.S. 605, 612, (1950).

b. The Court of Appeals in reversing the Trial Court's findings as to Count IV for breach of contract has disregarded and emasculated Rule 15(b) of the Federal Rules of Civil Procedure. When petitioners were given leave to amend their complaint to include this Count, the respondent

stood by and made no objection. Further, respondent made no objection when the evidence proving this breach of contract was introduced. Thus, this issue, not previously raised by the pleadings, was tried by consent of the parties in accord with Rule 15(b). Further, the Court of Appeals recognized the relationship of this Count to the other three when it stated on p. 7 of its opinion:

> "The evidence which was the basis of the later-filed Count IV was pertinent in some respects to the other Counts".

The effect of the Court of Appeals ruling in this regard is to reverse its position as expressed in *Hazeltine Research, Inc.* v. *Avco Mfg. Corp.*, (CA7) 227 F. 2d 137, (1955).

The Court of Appeals thus committed an error which should be rectified.

c. The respondent never specifically appealed from the District Court's findings and judgment that its mark (Pet. App. P. 145) infringed Petitioner's registered mark (Pet. App. P. 156) and unfairly competed. As a matter of fact, respondent never appealed from the injunction, never posted a bond, and even argued in reply to a contempt motion in the District Court that it was obeying the injunction. Nevertheless, the Court of Appeals apparently reversed the Trial Court's findings and judgment on the merits of the Counts for unfair competition and service mark infringement thus deciding issues which were never before it. Again, the Court below has committed an error which should be corrected.

CONCLUSION.

This case presents important questions which should be settled by this Court. The confusion and conflict between the various Circuits regarding the meaning of Sections 43(a) and 44 of the Lanham Act must be resolved. Proper interpretation of these Sections of the Federal Statute is important directly to a large segment of our population and indirectly affects substantially our entire purchasing public. Further, the Court below has utterly disregarded several vital well-established Rules of Federal Civil Procedure, and this Court's supervisory powers are called for.

The Writ should issue.

Respectfully submitted,

By: ELI MULLIN,

Attorney for Petitioners.

I. IRVING SILVERMAN,
DAVID D. KAUFMAN,
Of Counsel.

APPENDIX.

ORAL OPINION OF THE DISTRICT COURT.

This case was started in the year 1955 and I heard a good deal about it shortly after it was instituted, for some weeks or months. It came on for trial on Monday, February 18th. The trial was started on the morning of that day and it continued through the 19th, the 20th, the 21st, the 25th, the 26th, the 27th. The last testimony, that of Mr. Irving Mansfield, was received on March 1st.

The Court asked counsel for the parties to prepare drafts of findings of fact, conclusions of law and of the judgment order they thought their respective clients were entitled to, and asked that there be submitted briefs of their respective contentions.

As I recall it, the findings of fact, conclusions of law and judgment orders were filed on last Wednesday, March 6th, simultaneously. Reply briefs were filed simultaneously on last Friday, March 8th. I took all of those papers home with me on Friday night and I read them carefully Saturday morning.

As a result of what I had heard during the trial
927 of the case and as the result of the reading of those papers to which I had referred, I came to certain conclusions. I have indicated that I would hear oral arguments this morning, brief oral arguments, and I have heard a brief statement by Mr. Cohen on behalf of the plaintiff.

I won't proceed at great length. I will simply indicate to you some conclusions. I think the equities are clearly with

the defendant. I thought the defendants' witnesses were trying to tell the truth. Generally speaking, I think they did tell the truth. I wasn't as well impressed by the witnesses for the plaintiff, particularly the father, Ben Fullman, and the son, Sidney Fullman, and Norville (Norvin) Fullman.

I thought the Fullmans manifested a desire to overreach.

The evidence indicates that Ben Fullman, the father, and Irving Mansfield had, for a number of years, been friends, and, after listening to the evidence I have the impression that Mr. Mansfield has been successful in his business and Mr. Fullman has not been so successful.

928 The evidence further discloses that Mr. Ben Fullman conceived the idea of establishing a new venture and undertaking and he sought to interest Mr. Mansfield in it.

He did interest him to the extent of Mr. Mansfield undertaking to put up $12,000.00, approximately—$12,500.00; I don't remember—for a half interest in the enterprise.

Then what was done for the next few months? The plaintiff would have us think that Mr. Mansfield and his company were acting merely as agents for the Fullmans and their company.

As I understand the situation and the evidence, that was not the fact. What Mr. Mansfield and his company did was done under the impression that he was engaging in a joint enterprise with this Mr. Ben Fullman and his company. That is the impression I get from the evidence.

The Fullmans would have us believe that everything that Mr. Mansfield and his company did during that period of months was done merely as an agent for and on behalf of Mr. Fullman. I do not think that was the fact at all.

The evidence further discloses that the Fullmans repudiated the agreement which they had made for the inauguration of the joint enterprise. Whereupon, Mr. Mansfield terminated the doing of the work which
929 he and his company had been doing for the new enterprise. The Fullmans, claiming to establish rights by reason of what transpired during these months, then filed a bill in this court. That is the way the matter got into this court.

I don't think any good purpose would be served by my detailing the evidence. As I have indicated at the outset, I think the equities are clearly with the defendant. I went over and read the findings of fact and conclusions of law and the judgment order which the defendants think they are entitled to. They seem to me to be about right. I will study them over further and you gentlemen will come in on Wednesday, March 13th at 10:00 o'clock and I will let you know what I think further.

FINDINGS OF FACTS, CONCLUSIONS OF LAW, AND FINAL JUDGMENT ORDER.

[Entered March 14, 1957]

100 FINDINGS OF FACTS.

1. This is a suit for unfair competition brought by the Plaintiff, City Messenger of Hollywood, Inc., doing business under the tradename of City Messenger Air express against three corporate defendants and two individual defendants, as follows:

> City Bonded Messenger and Trucking Service, Inc., The Illinois Bell Telephone Company, The Reuben H. Donnelley Corporation, Irving Mansfield and Nadine Mansfield.

2. Defendants, City Bonded Messenger and Trucking Service, Inc., Irving Mansfield and Nadine Mansfield,
101 counterclaimed for unfair competition, service mark infringement, fraud and deceit and breach of contract.

3. Subsequent to the filing of the complaint but prior to the trial of the issues, namely on October 5, 1956, Defendant, City Bonded Messenger and Trucking Service, Inc., filed articles of amendment changing its name to City Bonded Messenger Service and an additional new corporation City Bonded Trucking Company, Inc., was incorporated, said new corporation and said Defendant, now by change of name City Bonded Messenger Service, were substituted for Defendant-Counter-Claimant, City Bonded Messenger and Trucking Service, Inc.

3. Defendants, Irving Mansfield and Nadine Mansfield, acted solely within the scope of their employment as em-

ployees and by motion were dismissed as Defendants from this case.

4. Defendants, Illinois Bell Telephone Company and the Reuben H. Donnelley Corporation have counter-claimed and cross-claimed for declaratory judgment, seeking an order from the Court concerning listings of the Plaintiff and the Defendants in both the Chicago Alphabetical telephone directory and the Chicago Classified telephone directory.

5. On April 29, 1955, the Court entered an order that both Plaintiff and Defendant be listed only under their respective corporate names and not under any assumed names, pending the further trial of the issues.

102 . 6. This Court has jurisdiction of the subject matter and parties involved.

7. Plaintiff, City Messenger of Hollywood, Inc., is a California Corporation doing business in the State of Illinois and having an office at 845 South Wabash Avenue, Chicago, Illinois. Defendants, City Bonded Messenger Service and City Bonded Trucking Company, Inc. are Illinois Corporations having their principal offices at 193 North LaSalle Street, Chicago, Illinois.

8. Defendants, City Bonded Messenger Service and City Bonded Trucking Company, Inc., and their predecessors in title, namely City Bonded Messenger and Trucking Service, Inc., a corporation, City Bonded Messenger and Trucking Service, a co-partnership comprising Irving Mansfield and Nadine Mansfield, and Irving Mansfield doing business as City Bonded Messenger Service, have continuously, openly and notoriously, since September 1942, engaged in the messenger and trucking business in the Chicago area, including Interstate Commerce within a 50 mile radius in the State of Indiana under their said tradenames.

9. The tradename and style of the aforementioned Defendants and their predecessors in title are presently and continuously have been, since September, 1942, dominated by the word "City" and the phrases "City Messenger" and "City Bonded Messenger".

103 10. The aforementioned Defendants and their predecessors in title presently are, and for a long time prior to the acts herein complained of, have been the owners and have continuously used in connection with the sale, advertising and rendering of messenger and trucking services in Interstate Commerce, a service mark comprising the word "City" written in script with a caricature messenger boy running through the letter C, the illustration of a speeding automobile positioned above the letter Y and having the word "Bonded" displayed below the word "City".

11. The aforementioned mark was duly registered on the Principal Register in the United States Patent Office on July 26, 1955, Registration No. 609,732 and said Defendants are the legal and equitable owners of said service mark and registration and have the right to sue for infringement thereof.

12. Plaintiff was incorporated in the State of California under the corporate name, City Messenger of Hollywood, Inc., on or about February 19, 1951.

13. Plaintiff failed to establish a chain of title showing any predecessor or use by any predecessor of a tradename or a service mark dominated by the word "City" or the phrases "City Bonded Messenger" or "City Messenger" in the sale, advertising or rendering of any messenger or trucking service prior to the date of its incorporation.

104 14. Modern Delivery Service, a California corporation doing business under the tradenames City Messenger and Express Co., City Transportation Co., and

City Messenger, filed a voluntary petition for bankruptcy in the United States District Court, Southern District of California, Central Division on July 15, 1948, was discharged January 9, 1952 with creditors receiving nothing on their claims; some of the principal officers of Plaintiff were principal officers in said Modern Delivery Service and had knowledge of said bankruptcy; and no purchase of any assets were made by Plaintiff or any of its officers from the Trustee in Bankruptcy of said Modern Delivery Service.

15. Plaintiff's corporate name, tradename and/or service marks are dominated by the word "City" and the phrase "City Messenger", and "City Bonded Messenger".

16. Plaintiff uses a service mark in connection with the sale, advertising and rendering of a messenger service, trucking service which is substantially identical to Defendant's service mark.

17. Prior to January, 1955 Plaintiff did not maintain an office or any facilities or engage in or render any messenger, trucking or related services in the Chicago area or within a 50 mile radius of the City of Chicago.

18. During the latter part of 1953 and during 1954, Plaintiff through its officers, falsely and fraudulently represented to Defendant-Counter-Claimants that they
105 were to join with it in the ownership and operation of an air freight forwarding business to be known as City Messenger Air Express, with Defendants taking charge of the operations of said business in Chicago, Illinois. Subsequently said Plaintiff, through its said officers continued to falsely and fraudulently represent that said air freight forwarding business had in fact been organized under said name, City Messenger Air Express, with Defendant-Counter-Claimants as part-owners thereof, and said Plaintiff, through its officers proceeded to act accord-

ingly as though said air freight forwarding business was in fact in existence and as though said Defendant-Counter-Claimants were in fact part-owners thereof, demanding that Defendants fulfill their duties and perform their alleged "part of the bargain".

19. In furtherance of said scheme, Plaintiff on May 18, 1954, falsely notified Defendant-Counter-Claimants that the Civil Aeronautics Board had approved, registered and issued to said new entity, City Messenger Air Express, authorization to engage in the air freight forwarding business, when in fact the authorization had been issued to Plaintiff.

20. Believing the aforementioned representations to be true and relying on the same, Defendant-Counter-Claimants fulfilled their duties and performed their alleged "part of the bargain" by expending large sums of money in "pay-outs" while conducting the air freight forwarding business, extending credit to Plaintiff, guaranteeing the credit of Plaintiff to various suppliers of services used in the air freight forwarding business, including United Air Lines, Inc., Railway Express and Air Express Agency, Inc., and Western Union Co., Inc., by purchasing, at request of Plaintiff, large numbers of printed forms necessary for use in the air freight forwarding business, purchasing and furnishing office supplies, telephone service, office space, terminal facilities, equipment and personnel, circulating and introducing Plaintiff to its customers for the purpose of obtaining business therefrom, furnishing the ground operation portion of the air freight forwarding services, and abstaining from furnishing said ground operation services on behalf of competitive air freight forwarders, including Emery Air Freight Forwarding Co., with consequent loss of revenue therefrom.

21. The aforementioned representations were false and were known by the Plaintiff to be false at the time they were made, and were made with the intent to surreptitiously gain an entry in the Chicago area market, including Defendants' own customers and with the intent of trading on the good will of the Defendants, and indeed trading on said good will by engaging in and rendering messenger, trucking and related services in the Chicago area and between Illinois and Indiana under the confusingly similar tradenames of City Messenger of Hollywood, Inc., City Messenger Air Express and City Bonded Messenger, and using in connection with the sale, advertising and rendering of said services, a service mark substantially identical to Defendants' service mark. The aforementioned representations were further made by Plaintiff with the intent to induce Defendant-Counter-Claimants to act thereon, and with intent to flagrantly deceive and defraud Defendant-Counter-Claimants.

107.

22. On or about September 7, 1954, Plaintiff entered into an oral contract with Defendant-Counter-Claimants for the sale of an undivided one-half interest of all the assets owned by and in the name of the Plaintiff, including the good will of the business and right to engage in the air freight forwarding business under Civil Aeronautics Board Letter of Registration No. 163, and subsequent thereto, Plaintiff breached said contract and failed and refused to perform the terms of said contract. Defendant-Counter-Claimants have done and performed all things by them to be performed under the terms of said contract.

23. Plaintiff has failed to prove that Defendants at any time diverted any shipments belonging to them to the own use of said Defendants or ever appropriated the proceeds of such shipments to their own use without accounting to the Plaintiff.

108 24. Plaintiff has failed to prove that Defendants ever engaged in unlawful, unfair or deceptive methods of competition against them, including specifically:

a. applying for and obtaining, without the knowledge and consent of the Plaintiff, of any telephone listing of any tradename belonging to Plaintiff, or fraudulently holding themselves out to be air shippers, or being in violation of any of the economic regulations of the Civil Aeronautics Board.

b. engaging in any false, fraudulent or deceptive advertising, including any advertising of City Messenger Air Express, without the consent or approval of the Plaintiff.

c. making any false representation to anybody concerning the credit or financial responsibility of the Plaintiff.

Plaintiff has failed to prove any allegation of unfair competition alleged in its complaint.

25. Since January, 1955, Plaintiff has engaged in and rendered messenger services including, but not limited to, the ground operation of air freight forwarding services in direct competition with Defendant-Counter-Claimant in the Chicago area and in Interstate Commerce within a radius of 50 miles of the City of Chicago.

109 26. Ground operations of air freight forwarding, namely pickup and delivery to and from the airport, comprises legitimate messenger and trucking services.

27. Prior to the entry of Plaintiff in the Chicago area market, by virtue of the prolonged use, extensive sale and advertising of their services, Defendant-Counter-Claimants' aforementioned service mark had acquired secondary significance in connection with the messenger service in the local area.

28. The tradenames City Messenger of Hollywood, Inc.,

City Messenger Air Express, City Bonded Messenger and/or any tradename dominated by the word "City" and/or the phrases "City Messenger" or "City Bonded Messenger", when used in connection with the sale, advertising or rendering of messenger, trucking, air freight forwarding or similar services, are confusingly similar to Defendant-Counter-Claimants' tradenames and the uses thereof by Plaintiff comprises unfair competition with Defendants.

29. Defendants' aforementioned service mark registration No. 609,732 is valid,

30. Plaintiff's use of said service mark in the sale, advertising or rendering of messenger, trucking and air freight forwarding services infringes Defendants' registered service mark.

31. Plaintiff adopted and used the aforementioned tradenames and service mark flagrantly and with full knowledge of Defendant-Counter-Claimants' prior use 110 thereof and with intent to unfairly compete and trade on Defendant-Counter-Claimants' good will, valuable credit and financial standing and reputation for integrity and fair dealing.

32. Defendant-Counter-Claimants' credit, financial standing and reputation have been injured by Plaintiff's unfair competitive practices.

33. Plaintiff has unfairly diverted revenues for messenger services rightfully belonging to Defendant-Counter-Claimants, including, but not limited to, revenues from a large number of the transactions involving the Admiral Corporation, 3800 West Cortland Street, Chicago, Illinois, as represented in Defendants' exhibit 53, and from transactions with Kuttner & Kuttner, Inc., 646 North Michigan Avenue, Chicago, Illinois.

34. Were it not for the fraud and deceit of Plaintiff and the contract with the Plaintiff, Defendant-Counter-Claim-

ants would have received revenues in the amount of approximately $500.00 per week for the rendering of ground operation messenger service to Emery Air Freight alone and during the period from May 22, 1954 through February, 1955.

35. The "pay-outs" and messenger services rendered by Defendant-Counter-Claimants on behalf of Plaintiffs during the rendering of air freight forwarding services during the period from May 22, 1954 to January 10, 1955 amounted to $1,526.83.

111 36. Plaintiff is guilty of flagrant, unfair competition and the instituting of this action was vexatious and solely for the purpose of harassing Defendant-Counter-Claimants.

CONCLUSIONS OF LAW

1. This Court has jurisdiction of the subject matter and the parties involved.

2. The service mark in suit is valid and infringed by Plaintiff.

3. Defendants' service mark has acquired secondary significance in the local area as it pertains to messenger service.

4. The granting of a certificate of authority to Plaintiff to engage in the air freight forwarding business under the names City Messenger of Hollywood, Inc., doing business as City Messenger Air Express did not empower Plaintiff to use said names in derogation of the long established prior right of Defendants.

5. The service marks and tradenames of the bankrupt Modern Delivery Service were vested in the trustee in bankruptcy upon the filing of the petition in bankruptcy, and the mere filing of the petition in bankruptcy did not

operate as an abandonment of the service mark or the trade names. No sale of said service mark or tradenames having been consummated, the same did not become available for use and appropriation by Plaintiff until after the discharge in bankruptcy on January 9, 1952.

112 6. The use by Plaintiff of the tradenames City Messenger of Hollywood, City Bonded Messenger and City Messenger Air Express or any tradename dominated by the word "City", the phrases "City Bonded" or "City Messenger", when used in the same area and in connection with the rendering of substantially similar services comprises unfair competition.

7. Plaintiff, who attempted by fraud and deceit to associate itself with Defendant and thereby surreptitiously enter the local market for the purpose of competing with Defendant under tradenames and using a service mark confusingly similar to Defendants' gained no right to use said tradenames and service marks in said area after said association was terminated.

8. Defendants have not engaged in unfair competition with Plaintiff, or diverted or appropriated anything belonging to Plaintiff.

9. Plaintiff has unfairly competed with Defendant-Counter-Claimants.

10. Plaintiff is guilty of fraud and deceit against Defendant-Counter-Claimants.

11. Plaintiff entered into a contract with Defendant-Counter-Claimants and subsequently breached said contract.

12. Plaintiff is guilty of bringing vexatious litigation against Defendants for the purpose of harassing them.

113 JUDGMENT ORDER

After a full and fair consideration of the evidence submitted in this case, It Is Hereby Ordered, Adjudged And Decreed That:

1. Defendants are entitled to an injunction restraining Plaintiff, its officers, agents, servants, employees and attorneys and all acting under and through them and each of them from directly or indirectly:
   a. Using the name City Messenger of Hollywood, Inc., City Messenger Air Express or City Bonded Messenger or any other name containing the word "City" or the phrases "City Bonded Messenger" or "City Messenger" or a service mark identical with or confusingly similar to Defendants' service mark, U. S. Registration No. 609732 Dated July 26, 1955, in connection with the sale, advertising, promotion or rendering of messenger, trucking, air freight forwarding service or any other service similar thereto in the City of Chicago, or within a 50-mile radius therefrom.
   b. Doing anything having the effect of representing that Plaintiff's services emanate from Defendants.
2. Defendant-Counter-Claimants are entitled to an accounting of profits and damages and this case shall be and it is hereby referred to Warren E. Carbary, Esq., a Master in Chancery of this court, for determination of:
   a. Defendant-Counter-Claimants' damages.
   b. Plaintiff's profits.

114 3. Defendant-Counter-Claimants are entitled to punitive damages and an award of treble profits and damages.

4. Defendant-Counter-Claimants are entitled to an award of damages for breach of contract and fraud and deceit in the amount to be determined by the Master heretofore appointed.
5. Defendant-Counter-Claimants are entitled to recover the sum of $1526.33 in repayment for services rendered and advances made on behalf of Plaintiff by Defendants.
6. Defendant-Counter-Claimants are entitled to an award of costs and disbursements against Plaintiff.
7. Defendant-Counter-Claimants are entitled to recover their attorneys fees from Plaintiff.

IT IS SO ORDERED

United States District Judge
/s/ John P. Barnes

Chicago, Illinois
Date: March 14, 1957

OPINION OF THE CIRCUIT COURT OF APPEALS.

IN THE

UNITED STATES COURT OF APPEALS

For The Seventh Circuit

No. 12046 SEPTEMBER TERM AND SESSION, 1957

City Messenger of Hollywood, Inc., A California corporation, doing business under the tradename of City Messenger Air Express,

Plaintiff-Appellant,

vs.

City Bonded Messenger Service, Inc., by change of name from City Bonded Messenger and Trucking Service, Inc., an Illinois corporation, City Bonded Trucking Company, Inc., an Illinois corporation, The Illinois Bell Telephone Company, an Illinois corporation, and the Reuben H. Donnelley Corporation, an Illinois corporation,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

January 9, 1958

Before DUFFY, *Chief Judge*, and FINNEGAN and HASTINGS, *Circuit Judges*.

DUFFY, *Chief Judge*. Asserting jurisdiction by reason of diversity of citizenship, plaintiff filed a complaint in the District Court for the Northern District of Illinois, alleging unfair competition. After answer, certain defendants filed a counterclaim which eventually contained four counts. Each count was filed on a different date.

Count I of the counterclaim filed June 28, 1955, alleged unfair competition. Count II alleged fraud and deceit, and was filed June 28, 1955, but was later withdrawn. Amended Count II also alleged fraud and deceit, and was

filed September 27, 1955. Count III was filed August 12, 1955 and alleged an infringement of trade-mark, the registration of which had been issued a few days previous thereto, to wit: on July 26, 1955. The defendant-counterclaimants rested their case on February 7, 1957, and Count IV alleging a breach of contract was filed the following day.

The District Court denied any relief to plaintiff and entered judgment in favor of the defendants on all four counts of the counterclaim. The judgment provided for an injunction restraining plaintiff and its officers and agents from using certain words in its name and advertising. The judgment also provided for an accounting of profits and damages, and a reference was made to a special master for determination of a) defendant-counterclaimants' damages; b) plaintiff's profits. The judgment also provided that defendant-counterclaimants were entitled to punitive damages and an award of treble profits and damages. The judgment further provided that defendant-counterclaimants were entitled to an award of damages for breach of contract and fraud and deceit, and were also entitled to recover $1,526.83 in repayment for services rendered and advances made by defendant corporation. There was also a provision that defendant-counterclaimants recover their attorney fees from plaintiff as well as their costs and disbursements.

In view of the award of punitive damages, treble damages and the assessment of attorney fees, it is necessary to analyze each count of the counterclaim to determine the applicable law. For reasons hereinafter stated, we hold that Counts I, II and IV are governed by the applicable law of Illinois; but that a part of Count III does state a federal claim.

Defendant-counterclaimants insist that Count I of the counterclaim asking damages for unfair competition is a federal cause of action governed by the Federal Trademark Act (Lanham Act) 15 U.S.C.A. §§ 1051-1127). Apparently at the time that Count was prepared and filed, the attorneys for defendant-counterclaimants were not of this view. An examination of the Count shows

that it was based expressly upon diversity of citizenship. The first three paragraphs of Count I assert the diversity of citizenship of the parties to this action and that the matter in controversy exceeded, exclusive of interest and costs, the sum of Three Thousand Dollars. Furthermore, Count I was filed before claimants had a registered service mark. Count I expressly alleged an infringement of defendant-counterclaimants' "common law rights by using * * * a service mark dominated by the word City * * *." We hold that Count I does not assert a federal cause of action.

This Court is committed to the view that the claim set forth in Count I of the counterclaim for damages caused by unfair competition is governed by the law of Illinois. *Independent Nail & Packing Co., Inc.* v. *Stronghold Screw Products, Inc.*, 7 Cir., 205 F. 2d 921, 926; *Jewel Tea Company, Inc.* v. *Krause*, 7 Cir., 187 F. 2d 278, 282; *Radio Shack Corporation* v. *Radio Shack, Inc.*, 7 Cir., 180 F. 2d 200, 202; *Wilhartz* v. *Turco Products*, 7 Cir., 164 F. 2d 731, 733. *Time, Inc.* v. *Viobin Corporation*, 7 Cir., 128 F. 2d 860, 862. We do not think that the Lanham Act changed this rule. We have been cited to no court authorities[1] that have held the Lanham Act has changed the rule long established and followed in this Circuit. On the contrary, the contention that the Lanham Act creates an independent ground for federal jurisdiction, and that a claim for damages for unfair competition in the United States between American citizens is governed by the Lanham Act, as argued by defendant-counterclaimants, has been expressly overruled in *American Automobile Association, Inc., et al* v. *Spiegel*, 2 Cir., 205 F. 2d 771, 775; *L'Aiglon Apparel, Inc.* v. *Lana Lobell, Inc.*, 3 Cir., 214 F. 2d 649, 654; *Royal Lace Paper Works, Inc., et al* v. *Pest-Guard Products, Inc.*, 5 Cir., 240 F. 2d 814, 818. We agree with these decisions.

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[1]Defendant-counterclaimants did cite *Steele* v. *Bulova Watch Company, Inc.*, 344 U.S. 280. The claims there asserted were for acts of trade-mark infringement and unfair competition consummated in Mexico. The case is not applicable to the situation we are here considering.

Counts II and IV of the counterclaim seeking recovery for fraud and deceit and breach of contract, respectively, are common law causes of action. These claims are governed by the law of Illinois.

There is no basis under Illinois law for the assessment of treble damages or the payment of attorney fees based on claims contained in Counts I, II and IV of the counterclaim. In *Patterson* v. *Northern Trust Company*, 286 Ill. 564, 122 N.E. 55, 57, the court said: "At common law costs were never recoverable, and they can be recovered only in cases where there is statutory authority therefor. Any party claiming a judgment for his costs against his adversary must bring himself within the operation of some statutory provision, and courts have no power to adjudge costs against anyone on merely equitable grounds."

In the later case of *Ritter* v. *Ritter*, 381 Ill. 549, 46 N.E. 2d 41, 43, the Court said: "The allowance and recovery of costs rests entirely upon statutory provisions and no liability for costs exists in the absence of statutory authorization." In *Trust Company of Chicago* v. *National Surety Corporation*, 7 Cir., 177 F. 2d 816, after quoting from *Patterson* and *Ritter*, we held that under Illinois law attorney fees could not be assessed against the losing party. See also *Danville Building Association, etc.* v. *Gates, et al.*, 66 F. Supp. 706. The opinion in that case was written by Judge Lindley, and he stated at page 709: "I think it clear that the inevitable effect of this decision is that a federal court may no longer grant an equitable remedy in a diversity action where that relief is not available in the courts of the state, * * *".

Disregarding for the moment Count III, we hold that there was no authority in the District Court to assess treble damages or to award attorney fees as to the claims contained in Counts I, II and IV, and in doing so, the Court committed reversible error.

Count III of the counterclaim was filed August 12, 1955, eleven weeks after the commencement of the instant suit, and seventeen days after the date of the registration of defendants' mark. Paragraph 1 thereof re-alleged paragraphs 1, 2 and 3 of Count I of the counterclaim. By

such reference diversity of citizenship of the parties was set forth and also the amount in controversy. Paragraph 2 of Count III then alleges an additional jurisdictional ground as follows:

> "2. As an additional ground for jurisdiction of this Court, Defendant alleges that it is based upon infringement of its service mark used in commerce among the several states of the United States *and* upon infringement of said service mark duly registered in the United States Patent Office in accordance with the Trade Mark Act of July 5, 1946."

This paragraph can properly be construed as asserting jurisdiction under a federal law. 28 U.S.C. §1338(b) provides: "The district courts shall have original jurisdiction of any civil action asserting a claim of unfair competition when joined with a substantial and related claim under the copyright, patent and trademark laws."

Count I alleges unfair competition by plaintiff with reference to defendant's unregistered mark, and the principal emphasis of Count III is as to the registered trade-mark. With such overlapping of claims we hold that the allowance for damages, if any, under Count I should extend no further than July 26, 1955, the date of the registration of defendants' mark. A cut-off at this point is necessary to prevent a duplication of compensatory damages, if any are awarded. On the other hand, damages, if any, for the infringement of defendants' registered trade-mark, and the related claim for unfair competition, cannot extend further back than July 26, 1955.

In *Strey* v. *Devines, Inc.*, 7 Cir., 217 F. 2d 187, 189, we said: "Thus, the District Court's jurisdiction of plaintiff's claim of unfair competition existed to the limited extent that it is 'related' to his claim of trademark infringement. Federal jurisdiction was only obtained in this case by reason of the registration of plaintiff's trade-mark. The principle involved is well stated in *Landstrom* v. *Thorpe*, 8 Cir., 189 F. 2d 46, 51 '* * * For such a claim to be 'related' to a case arising under the trade-mark law within the meaning of the statute, 'it must appear that both federal and nonfederal causes (of action) rest upon

substantially identical facts.'" In the same case, we also said at page 189: "It follows that the District Court did have jurisdiction as to any acts of the defendant which may have constituted unfair competition providing that same occurred on or after September 9, 1952, the date of the registration of plaintiff's trade-mark."

Upon a retrial of this case, consideration should be given to 15 U.S.C.A. §1117, which provides:

> "When a violation of any right of the registrant of a mark registered in the Patent Office shall have been established in any civil action arising under this chapter, the plaintiff shall be entitled, subject to the provisions of sections 1111 and 1113 (1) (b)[1] of this title, and subject to the principles of equity, to recover (1) defendant's profits, (2) any damages sustained by the plaintiff, and (3) the costs of the action. The court shall assess such profits and damages or cause the same to be assessed under its direction. In assessing profits the plaintiff shall be required to prove defendant's sales only; defendant must prove all elements of cost or deduction claimed. In assessing damages the court may enter judgment, according to the circumstances of the case, for any sum above the amount found as actual damages, not exceeding three times such amount. If the court shall find that the amount of the recovery based on profits is either inadequate or excessive the court may in its discretion enter judgment for such sum as the court shall find to be just, according to the circumstances of the case. Such sum in either of the above circumstances shall constitute compensation and not a penalty."

Also pertinent on the question of damages is 15 U.S.C.A. §1111, which provides that unless a registrant gives notice that his mark is registered, no proceeds or damages shall be recovered unless the alleged infringer had actual notice of the registration.

If, on a retrial of this cause, a finding of unfair com-

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[1] So in original. Probably should read "1114(1)(b)."

petition is made, it does not necessarily follow that the prevailing party is entitled to a monetary award or an accounting of profits. An injunction may satisfy the equities of the case. *Radio Shack Corporation* v. *Radio Shack, Inc.*, 7 Cir., 180 F. 2d 200, 207; *Consumers Petroleum Co.* v. *Consumers Co. of Illinois*, 7 Cir., 169 F. 2d 153, 163.

Count IV of the counterclaim was filed the day after defendant-counterclaimants had concluded their testimony. Leave to file this count was granted by the District Judge on the theory the amendment was to conform to the evidence. Rule 15(b) Federal Rules of Civil Procedure. Apparently, no opportunity was afforded to the plaintiff to answer Count IV nor is it clear that any request to file or present an answer was made. Also, there was no request for a continuance upon the part of plaintiff.

In substance, Count IV alleged that on or about September 7, 1954, at Los Angeles, defendant City Bonded Messenger Service, Inc. and City Bonded Trucking Company, Inc. "* * * offered to purchase for $12,500.00 an undivided one-half interest in all of the assets owned by and in the name of the Plaintiff * * * including the good will of the business attaching thereto and the right to engage in the business of an air freight forwarder under Civil Aeronautics Board letter of registration No. 163."[2] The Count alleged acceptance by the plaintiff of the offer to purchase but that there was a failure to deliver to defendants a one-half interest in all of plaintiff's assets "including the good will * * * and the right to engage in the business as an air freight forwarder under Civil Aeronautics Board Letter of registration No. 163." Defendant-counterclaimants alleged damages of $16,526.83.

Although amendments to conform to the evidence may properly be allowed under many situations, we think the issues in Count IV should be determined only after plead-

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[2] The letter of registration from the Civil Aeronautics Board to plaintiff was dated May 21, 1954, effective May 22, 1954, and by its terms was not transferable.

ings defining the issues have been filed and the parties have had adequate opportunity to offer evidence pertaining thereto.

One other matter pertaining to Count IV may properly be decided at this time. Plaintiff contends that the procedure whereby the trial court allowed a new cause of action after defendant-counterclaimants had rested their case, deprived plaintiff of his right to a trial by jury as guaranteed by the Seventh Amendment to the Constitution of the United States. We do not agree. Plaintiff could have asked a jury trial on Counts II and III but did not do so. The evidence which was the basis of the later-filed Count IV was pertinent in some respects to the other Counts. When defendant-counterclaimants asked leave to file Count IV, plaintiff made no objections that it was being deprived of a jury trial. Under all the circumstances, we think that the right to have a jury trial on the issues raised by Count IV of the counterclaim was waived by the plaintiff.

Over objections by plaintiff, the trial court received testimony concerning a claim of $1,526.83, "for services rendered and advances made on behalf of Plaintiff by Defendants." This claim was not set forth in the pleadings. Nevertheless, the District Court made Finding of Fact 35 favorable to the defendants on this point and the judgment provided that $1,526.83 should be recovered by defendant-counterclaimants. This particular controversy was the subject of a separate suit between the parties herein which was commenced in the Municipal Court of Chicago by the defendants herein, and was identified as Case No. 55 M 2286. On the first day of the trial in Municipal Court the parties negotiated a settlement and the action was dismissed by consent with the proviso it was subject to reinstatement in the event the terms of the settlement were not fulfilled. Although it is here suggested the settlement terms were not carried out, we see no justification for further complicating the issues herein by interjecting into this suit issues which were the subject of a separate lawsuit. If defendant-counterclaimants were entitled to relief as to those issues, it should have proceeded in the Municipal Court. Finding of

Fact 35 has no proper basis in this record, and paragraph 5 of the judgment order is reversed with directions that same be vacated.

The trial court found that the institution of this suit was vexatious and for the purpose of harassment. For some reason, plaintiff did not appeal from the judgment dismissing its claim. We, therefore, do not comment upon the merits of plaintiff's suit except insofar as the claimed vexatious conduct may be the basis on which the trial court awarded punitive and treble damages and assessed attorneys' fees. We have hereinbefore decided there was no authority in the trial court to award such damages and to assess attorney fees as to Counts I, II and IV. We now decide that no such damages should have been awarded as to any Count of the counterclaim, even if it might be held that Illinois law permitted such procedure as to Counts I, II and IV.

It would over-extend this already lengthy opinion to set out in detail why we think plaintiff was entitled to its day in court without risking punitive damages and assessment of attorney fees. After a reading of the extensive record before us, we are unable to ascertain any basis for the finding that the suit was vexatious and brought for the purpose of harassment.

Under all the circumstances of this case, we think the interest of justice will best be served by reversing the judgment as to all four Counts of the counterclaim, and remanding the cause for a new trial. We are also of the view that there should be no occasion to refer any of the issues to a master.

REVERSED and REMANDED.

FINNEGAN, *C.J.* Concurs in the result.

A true Copy:
Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

OPINION OF THE CIRCUIT COURT OF APPEALS ON PETITION FOR REHEARING.

IN THE

UNITED STATES COURT OF APPEALS

For The Seventh Circuit

No. 12046 SEPTEMBER TERM, APRIL SESSION, 1958

City Messenger of Hollywood, Inc., A California corporation, doing business under the tradename of City Messenger Air Express,

Plaintiff-Appellant,

VS.

City Bonded Messenger Service, Inc., by change of name from City Bonded Messenger and Trucking Service, Inc., an Illinois corporation, City Bonded Trucking Company, Inc., an Illinois corporation, The Illinois Bell Telephone Company, an Illinois corporation, and the Reuben H. Donnelley Corporation, an Illinois corporation,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

May 22, 1958

Before DUFFY, *Chief Judge*, and FINNEGAN and HASTINGS, *Circuit Judges*.

DUFFY, *Chief Judge*. Defendants urge six principal grounds for a rehearing. We have carefully examined these contentions, but find none sufficient to grant the petition for rehearing. We shall discuss only three.

We held the issues as to Count IV which count was filed after the conclusion of the testimony, should be determined only after pleadings defining the issues have been filed, and the parties have had adequate opportunity to offer evidence pertaining thereto. Defendant-counterclaimants

insist the issues as to Count IV were tried by the implied consent of the parties. To have any kind of consent, there must be knowledge. It is apparent that the claim for breach of contract contained in Count IV occurred to counsel for counterclaimants after he had rested his case. Under the circumstances, neither plaintiff nor counterclaimants tried the issue by implied consent.

Counterclaimants insist that in our opinion we refer to several questions which were not properly before us stating: "No appeal was taken from the district court's findings and judgment that plaintiff infringed defendants' registered mark and unfairly competed with defendant-counterclaimants." The short answer is that plaintiff appealed from the entire judgment.

In our original opinion we stated that there was no authority in the district court to assess treble damages or award attorney's fees as to Claims I, II and IV. This is correct but we further said: "and in doing so, the Court committed reversible error" The original opinion should be modified so as to read "and in doing so, as to Count I the Court committed reversible error."

The petition for rehearing is

DENIED.

FINNEGAN, *Circuit Judge.* I would allow a rehearing and for that reason disavow all that is said by Chief Judge Duffy "On Petition for Rehearing."

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

STATUTES AND RULES INVOLVED.

Section 44(b) of The Lanham Act 15 USC 1126(b)

> Persons who are nationals of, domiciled in, or have a bona fide and effective business or commercial establishment in any foreign country, which is a party to (1) the International Convention for the Protection of Industrial Property, signed at Paris on March 20, 1883; or (2) the General Inter-American Convention for Trade-Mark and Commercial Protection signed at Washington on February 20, 1929; or (3) any other convention or treaty relating to trademarks, trade or commercial names, or the repression of unfair competition to which the United States is a party, shall be entitled to the benefits and subject to the provisions of this Act to the extent and under the conditions essential to give effect to any such conventions and treaties so long as the United States shall continue to be a party thereto, except as provided in the following paragraphs of this section (15 USC 1126b).

Section 44(h) of The Lanham Act 15 USC 1126(h)

> Any person designated in paragraph (b) of this section as entitled to the benefits and subject to the provisions of this Act shall be entitled to effective protection against unfair competition, and the remedies provided herein for infringement of marks shall be available so far as they may be appropriate in repressing acts of unfair competition (15 USC 1126h).

Section 44(i) of The Lanham Act 15 USC 1126(i)

> Citizens or residents of the United States shall have the same benefits as are granted by this secton to persons described in paragraph (b) hereof (15 USC 1126i).

Section 43(a) of The Lanham Act 15 USC 1125(a)

> Any person who shall affix, apply, or annex, or use in connection with any goods or services, or any container or containers for goods, a false designation of origin, or any false description or representation, including words or other symbols tending falsely to describe or represent the same, and shall cause such goods or services to enter into commerce, and any person who shall with knowledge of the falsity of such designation of origin or description or representation cause or procure the same to be transported or used in commerce or deliver the same to any carrier to be transported or used, shall be liable to a civil action by any person doing business in the locality falsely indicated as that of origin or the region in which said locality is situated, or by any person who believes that he is or is likely to be damaged by the use of any such false description or representation (15 USC 1125a).

Rule 52(a) of the Federal Rules of Civil Procedure

> In all actions tried upon the facts without a jury or with an advisory jury; the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Request for findings are not necessary for the purposes of review. Findings of fact shall not be set aside unless clearly erroneous; and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The Findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

Rule 15(b) of the Federal Rules of Civil Procedure

When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

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IN THE

Supreme Court of the United States

October Term, 1958

No. 191

CITY BONDED MESSENGER SERVICE, INC., *et al.*,
Petitioners,

vs.

CITY MESSENGER OF HOLLYWOOD, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

City Messenger of Hollywood, Inc., Respondent, by Harry G. Fins and David O. Kuh, its Counsel, respectfully presents to this Honorable Court the following in opposition to the petition for certiorari herein:

POINT I

The Lanham Trade-Mark Act is not involved since petitioners' action for unfair competition expressly sought recovery only for "common law rights" and did not assert any federal cause of action.

It should be noted that Count I of the Counterclaim expressly relied on diversity of citizenship for jurisdiction and alleged as follows (Appellant's Appendix 24 below):

"As a counterclaim Defendant, City Bonded Messenger & Trucking Service, Inc., praying for the relief hereby sought avers:

1. Defendant, City Bonded Messenger & Trucking Service, Inc., is a corporation organized and existing under and by virtue of the laws of the State of Illinois, with its principal place of business in the City of Chicago, County of Cook, and State of Illinois.

2. Plaintiff is a corporation organized and existing under the laws of the State of California, with a place of business in the City of Chicago, County of Cook, and State of Illinois.

3. The matter in controversy herein exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars ($3,000.00)."

It must also be noted that Count I of the Counterclaim was filed on June 28, 1955 (Appellant's Appendix 24 below) *before the counterclaimant had a registered service mark*, and that Count I of the Counterclaim *expressly alleges an infringement upon the counterclaimant's* "common law rights *by using . . . a service mark dominated by the word City*" (Appellant's Appendix 26 below).

The Court of Appeals for the Seventh Circuit in the opinion in the case at bar (Appendix to Petition for Certiorari, pages 17a-17b) said:

"Defendant-counterclaimants insist that Count I of the counterclaim asking damages for unfair competition is a federal cause of action governed by the Federal Trade-mark Act (Lanham Act) 15 U.S.C.A. 1051-1127. Apparently, at the time that Count was prepared and filed, the attorneys for defendant-

counterclaimants were not of this view. An examination of the Count shows that it was based expressly upon diversity of citizenship. The first three paragraphs of Count I assert the diversity of citizenship of the parties to this action and that the matter in controversy exceeded, exclusive of interest and costs, the sum of Three Thousand Dollars. Furthermore, Count I was filed before claimants had a registered service mark. Count I expressly alleged an infringement of defendant-counterclaimants' 'common law rights by using * * * a service mark dominated by the word City * * *.' We hold that Count I does not assert a federal cause of action.'"

The petitioners, by seeking to enforce only their "common law rights," waived all questions under the Lanham Act.

POINT II

Five United States Courts of Appeals have expressly held that the Lanham Trade-Mark Act does not apply to unfair competition in the United States between American citizens.

The contention of the petitioners that unfair competition in the United States between American citizens is governed by the Lanham Trade-Mark Act has been expressly overruled by the United States Courts of Appeals for the Second Circuit in 1953, the Third Circuit in 1954, the Fifth Circuit in 1957, the Eighth Circuit in 1957, and the Seventh Circuit in 1958.

In *American Auto Ass'n* v. *Spiegel*, 2 Cir., 205 F. (2d) 771 (1953) certiorari denied 346 U. S. 887, Judge Learned Hand, writing the unanimous opinion of the Court, said at pages 774-775:

"Subsection 1126(h) declares that 'Any person designated in subsection (b) as entitled to the benefits and subject to the provisions of this chapter shall be entitled to effective protection against unfair competition, and the remedies * * * for infringement of marks shall be available so far as they may be appropriate in repressing acts of unfair competition.' Since this subsection is limited to 'person designated in subsection (b)', we look to that subsection to learn its scope. It grants to aliens and to others, domiciled, or doing business, in a foreign country 'the benefits * * * of this chapter to the extent and under the conditions essential to give effect to any such conventions and treaties'; *i.e.*, to those conventions and treaties that the subsection has just mentioned. The first two of these are specified conventions of 1883 and 1929, and the third is described as 'any other convention or treaty relating to trade-marks, trade or commercial names or the repression of unfair competition.' Since only persons so described are entitled to protection against 'unfair competition,' no one may invoke the remedies otherwise available under the Act to whom some 'benefit' has not been granted by a 'convention' or a 'treaty.' Since subsection (b) is confined to aliens and non-residents, the plaintiffs must bring themselves within subsection (i), upon which alone jurisdiction over this action must rest. It provides that United States citizens 'shall have the same benefits as are granted by this section to persons described in subsection (b) of this section.' That means that citizens shall have whatever 'benefits' subsection (b) gives to aliens; and, so far as concerns 'unfair competition,' those 'benefits' are limited to such as may be found in some 'conven-

> tion or treaty relating to * * * the repression of unfair competition'. The purpose of this subsection, quite clearly, is no more than to extend to citizens and residents those 'benefits' that any 'convention or treaty' gives to aliens, including the same remedies for 'protection against unfair competition' that subsection (h) gives to aliens. (The same purpose appears in subsection (g) as to 'trade-names.') Having implemented such 'conventions and treaties' by subsections (g) and (h) in favor of aliens, Congress very naturally wished to put citizens on an equal footing. We are forced to the conclusion that the Act does not give jurisdiction to the district courts over an action brought by any plaintiff with whose interstate commerce the defendant has unfairly competed."

In *L'Aiglon Apparel, Inc.* v. *Lana Lobell, Inc.*, 3 Cir. 214 F. (2) 649 (1954), the Court of Appeals for the Third Circuit said at page 652:

> "The second Circuit view is that Section 44, which together with Section 39 contains the provisions of the Lanham Act relied on here as the basis of jurisdiction, reveals merely a design to give United States citizens reciprocal rights against foreign nationals where foreign nationals compete unfairly with them. It does not aim to create a federal law of unfair competition available to United States citizens one against the other nor does it grant the federal courts any new authority to hear such controversies between citizens. *American Automobile Association* v. *Spiegel*, 2 Cir., 1953, 205 F. 2d 771. Accord: *Old Reading Brewery, Inc.* v. *Lebanon Valley Brewing Co.*, M. D. Pa. 1952, 102 F. Supp. 434."

In *Royal Lace Paper Works, Inc.* v. *Pest-Guard Products, Inc.*, 5 Cir., 240 F. (2) 814 (1957), the Court of Appeals for the Fifth Circuit said at page 818:

> "For the reasons hereafter briefly stated, we find ourselves in agreement with appellants' view that the Lanham Act does not support plaintiff's claim to jurisdiction, rather than with the view of appellee that it does.
>
> Looked at independently of the decision cited and relied on by the parties and construed, as such a statute ought to be, as a consistent whole, we find no language in it in terms conferring jurisdiction as to claims dealing with unregistered trade marks or with unfair competition. Specifically concerned, as it is, with registered trade marks, it would, we think, be to rewrite instead of to construe the statute if we should read it as including within its scope unregistered trade marks or unfair competition generally."

In *Iowa Farmers Union* v. *Farmers' Educational & Cooperative Union*, 8 Cir., 247 F. (2) 809 (1957), the United States Court of Appeals for the Eighth Circuit, on petition for rehearing said at page 819:

> "Our decision is in accord with those of the Second, Third and Fifth Circuits in *American Auto Association* v. *Spiegel*, 2 Cir., 205 F. 2d 771; *L'Aiglon Apparel* v. *Lana Lobell, Inc.*, 3 Cir., 214 F. 2d 649 and *Royal Lace Paper Works, Inc.* v. *Pest-Guard Products, Inc.*, 5 Cir., 240 F. 2d 814."

The Court of Appeals for the Seventh Circuit in the opinion in the case at bar 254 F. 2d 531 (Appendix, Petition for Certiorari, page 18a) said:

> "This Court is committed to the view that the claim set forth in Count I of the counterclaim for

damages caused by unfair competition is governed by the law of Illinois. *Independent Nail & Packing Co., Inc.* v. *Stronghold Screw Products, Inc.*, 7 Cir., 205 F. 2d 921, 926; *Jewel Tea Company, Inc.* v. *Krause*, 7 Cir., 187 F. 2d 278, 282; *Radio Shack Corporation* v. *Radio Shack, Inc.*, 7 Cir., 180 F. 2d 200, 202; *Wilhartz* v. *Turco Products*, 7 Cir., 164 F. 2d 731, 733. *Time, Inc.* v. *Viobin Corporation*, 7 Cir., 128 F. 2d 860, 862. We do not think that the Lanham Act changed this rule. We have been cited to no court authorities that have held the Lanham Act has changed the rule long established and followed in this Circuit. On the contrary, the contention that the Lanham Act creates an independent ground for federal jurisdiction, and that a claim for damages for unfair competition in the United States between American citizens is governed by the Lanham Act, as argued by defendant-counterclaimants, has been expressly overruled in *American Automobile Association, Inc., et al.* v. *Spiegel*, 2 Cir., 205 F. 2d 771, 775; *L'Aiglon Apparel, Inc.* v. *Lana Lobell, Inc.*, 3 Cir., 214 F. 2d 649, 654; *Royal Lace Paper Works, Inc., et al.* v. *Rest-Guard Products, Inc.*, 5 Cir., 240 F. 2d 814, 818. We agree with these decisions."

POINT III

The earlier decisions of the Ninth Circuit upon which petitioners rely have been abandoned by that Court.

In *Stauffer* v. *Exley*, 9 Cir., 184 F. (2) 962 (1950), and *Pagliero* v. *Wallace China Co.*, 9 Cir., 198 F. (2) 339 (1952), the United States Court of Appeals for the Ninth Circuit had held that the Lanham Trade-Mark Act ap-

plied to unfair competition in the United States between American citizens.

In *American Automobile Association* v. *Spiegel*, 205 F. (2) 771 (1953), the United States Court of Appeals for the Second Circuit held, directly contrary to the Ninth Circuit, that the Lanham Trade-Mark Act did not apply to unfair competition in the United States between American citizens.

During the October Term 1953 of this Court, a petition for certiorari by the American Automobile Association was presented to this Court, under Docket No. 367, wherein the conflict between the Second and Ninth Circuits was fully presented and argued. On November 16, 1953, this Court denied certiorari. *American Automobile Association* v. *Spiegel*, 346 U. S. 887.

Since then, the United States Court of Appeals for the Ninth Circuit has abandoned and no longer follows its holdings in the *Stauffer* and *Pagliero* cases, *supra*, as follows:

In *National Van Lines* v. *Dean*, 9 Cir., 237 F. (2) 688 (1956), that Court said at page 691:

> "We will first direct our attention to the specifications of error pertaining to appellant's claim of unfair competition.
>
> "As to this claim, the law of the state in which the acts occurred (California) governs."

Likewise, in *Hall* v. *Wright*, 9 Cir., 240 F. (2) 787 (1957), that Court said at page 795:

> "That the substantive law of California governs on the question of unfair competition, see: *Fashion Originators' Guild of America* v. *Federal Trade Commission*, 312 U. S. 457, 61 S. Ct. 703, 85 L. Ed.

949; *Pecheur Lozenge Co.* v. *National Candy Co.*, 315 U. S. 666, 62 S. Ct. 853, 86 L. Ed. 1103; *National Van Lines* v. *Dean*, 9 Cir., 237 F. 2d 688."

Therefore, the Ninth Circuit is now in accord with the other United States Courts of Appeal and there is no longer any conflict.

POINT IV

The United States Courts of Appeals unanimously hold that unfair competition actions are governed by state law.

From 1953 to 1958, inclusive, the eight United States Courts of Appeals which have dealt with the problem unanimously hold that actions for unfair competition are governed by state law:

First Circuit—

Esquire Inc. v. *Esquire Slipper Manufacturing Co.*, 1 Cir., 243 F. (2) 540 (1957).

Second Circuit—

American Automobile Association Inc. v. *Spiegel*, 2 Cir., 205 F. (2) 771 (1953) certiorari denied 346 U. S. 887.

Third Circuit—

L'Aiglon Apparel, Inc. v. *Lana Lobell*, 3 Cir., 214 F. (2) 649 (1954).

Fifth Circuit—

Royal Lace Paper Works v. *Pest-Guard Products*, 5 Cir., 240 F. (2) 814 (1957).

Sixth Circuit—

Tas-T-Nut Company v. *Variety Nut & Date Company*, 6 Cir., 245 F. (2) 3 (1957).

Seventh Circuit—

Independent Nail & Packing Co., Inc. v. *Stronghold Screw Products, Inc.*, 7 Cir., 205 F. (2) 921 (1953) certiorari denied 346 U. S. 886;
City Messenger of Hollywood, Inc. v. *City Bonded Messenger Service, Inc.*, 7 Cir., 254 F. (2) 531 (1958).

Eighth Circuit—

Iowa Farmers Union v. *Farmers Educational & Cooperative Union*, 8 Cir., 247 F. (2) 809 (1957).

Ninth Circuit—

National Van Lines v. *Dean*, 9 Cir., 237 F. (2) 688 (1956);
Hall v. *Wright*, 9 Cir., 240 F. (2) 787 (1957).

Our thorough research does not disclose any decision on the subject by the Courts of Appeals for the Fourth and Tenth Circuits.

POINT V

Section 43(a) of the Lanham Act (15 USC. Section 1125a) is not here involved.

The petitioners have changed their position in connection with the Lanham Act several times during the course of this litigation, as follows:

1. In Count I of the Counterclaim (Appellant's Appendix below, p. 26), petitioners based their cause of action for unfair competition upon their "common law rights".

2. Before the Court of Appeals they relied upon Section 44 of the Lanham Act (15 U.S.C. Section 1126) (Appellees' Brief below, p. 15), although on their petition for clarification and rehearing (Petition for Clarification and Rehearing below, p. 9) they casually alluded to Section 43(a) of the Lanham Act (Appendix, Petition for Certiorari, p. 28a). However, petitioners there did not contend that that section was applicable in the case at bar.

3. In the Petition for Certiorari petitioners now argue concerning Section 43(a). Nor, apparently do they now contend that that section is in any way determinative of the issues in the instant case. It would appear that they present the matter to this Court merely as their academic statement or conclusion concerning the Court of Appeals' holding regarding Section 43(a) of the Lanham Act.

The opinion of the Court of Appeals clearly sets forth its views concerning petitioner's contentions regarding the Lanham Act (Appendix, Petition for Certiorari, p. 17a) and the authorities upon which the same are based and petitioners have not shown that such views are erroneous.

POINT VI.

The District Court's findings of fact and conclusions of law not having been supported by any evidence in the record. Rule 52(a) of the Federal Rules of Civil Procedure has no application herein.

The respondent here, appellant below, contended before the Court of Appeals that the Trial Court's findings and conclusions were not based on any evidence in the record

and were contrary to the settled law and that by reason thereof Rule 52(a) of the Federal Rules of Civil Procedure (Appendix, Petition for Certiorari, p. 28a) had no application to the case at bar (Appellant's brief below, p. 44; Appellant's reply brief below, p. 32; answer to Petition for Clarification and Rehearing, p. 4).

The several points set out in its briefs before that Court fully supported that contention as to all the counterclaims in petitioners' District Court pleadings and amendments thereto. The respondent here had challenged such findings and conclusions before that Court, and it having reversed the entire judgment, the conclusion is inescapable that it sustained respondent's contentions, found that there was no substantial evidence in the record to support the findings and conclusions and that the same were therefore erroneous.

The duty of an appellate court in connection with a challenge to findings and conclusions of a Trial Court is set out in *Chatz* v. *Armour Plant Employees' Credit Union*, 7 Cir. 154 F. 2d 236 (1946) at 239, as follows:

> "A challenge of a finding of fact must be examined on appeal where the appellant asserts that the lower court's finding (a) is unsupported by substantial evidence, or (b) is contrary to the clear weight of the evidence, or (c) is induced by an erroneous view of the law. [citing in the margin] *Morley Const. Co.* v. *Maryland Cas. Co.*, 300 U. S. 185, 57 S. Ct. 325, 81 L. Ed. 593; *Harkin* v. *Brundage*, 276 U.S. 36, 48 S. Ct. 268, 72 L. Ed. 457; *Collier* v. *United States*, 173 U.S. 79, 19 S. Ct. 330, 43 L. Ed. 621; *Lawson* v. *United States Min. Co.*, 207 U.S. 1, 28 S. Ct. 15, 52 L. Ed. 65; *Campana Corp.* v. *Harrison*, 7 Cir., 114 F. 2d 400; *Pickering* v. *Corson*, 7 Cir., 108 F. 2d 546; *Flynn* v. *Smith*, 7 Cir., 90 F. 2d 305."

And the measure of the consideration to be given to such findings and conclusions by an appellate court is stated in *Campana Corporation* v. *Harrison*, 7 Cir., 114 F. 2d 400 (1940) at pages 405-406, as follows:

> "Of course Federal Rule 52 does not require us to accept fact findings unsupported by the evidence. Nor does this Rule require us to respect conclusions of law which do not rest properly on the facts so found. It is certain that the principle giving the above described weight to the trial court's findings of fact, does not compel the reviewing court to give any specific weight to the trial court's conclusions of law, as it yet remains the duty of the appellate court to decide whether the correct rule of law has been applied to the facts found. Whether special findings are supported by the evidence or whether they give the requisite support to conclusions rendered thereon, are questions open to consideration here."

It follows that Rule 52(a) does not apply to the case at bar.

Solar Corporation v. *Bork-Warner Corporation*, 244 F. 2d 940 and *Gravel Tank Co.* v. *Linde Air Prod. Co.*, 336 U. S. 271, and 339 U. S. 605, cited by petitioners, were patent cases where the appellate courts declined to disturb the findings because the District Court had had the opportunity of hearing expert witnesses and observing demonstrations of the arts involved; situations markedly dissimilar to that before the trial court in the case at bar. These cases cannot be taken as precedents applicable to this cause.

POINT VII

Rule 15(b) of the Federal Rules of Civil Procedure does not apply in this case.

Rule 15(b) of the Federal Rules of Civil Procedure, the pertinent part of which reads as follows:

> "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings."

has no application to the case at bar since, during the trial, the respondent here could not possibly have known that petitioners intended subsequently to assert a cause of action in breach of contract. It was only after the petitioners rested their entire case that their attorney stated he thought he had made out a case of breach of contract and said he would like to put in such a count. The Trial Court granted him leave so to do as of the following day (Appellant's Appendix below, p. 189).

Consent, express or implied, can only be based on knowledge and since neither petitioners nor respondent were aware during the trial of any issue of breach of contract, respondent here could not have either knowingly or unknowingly consented thereto.

The Court of Appeals said on this phase of this case (Appendix, Petition for Certiorari, p. 25a):

> "Although amendments to conform to the evidence may properly be allowed under many situations, we think the issues in Count IV should be determined only after pleadings defining the issues have been filed and the parties have had adequate opportunity to offer evidence pertaining thereto."

and in its opinion denying the petition for clarification and rehearing (Appendix, Petition for Certiorari, p. 25a) that Court said:

> "Defendant-counterclaimants (petitioners here) insist the issues as to Count IV were tried by the implied consent of the parties. To have any kind of consent there must be knowledge. It is apparent that the claim for breach of contract contained in Count IV occurred to counsel for counterclaimants after he had rested his case. Under the circumstances, neither plaintiff nor counterclaimants tried the issue by implied consent."

The record in this case is devoid of any proof that respondent here either expressly or impliedly consented to the trial of the issue of breach of contract. Absent consent Rule 15(b) has no application.

POINT VIII

The respondent appealed to the Court of Appeals from the entire judgment of the District Court including each and every part thereof.

The Notice of Appeal to the Court of Appeals, which was drawn in accordance with Form 27 of the Supreme Court of the United States, read as follows (Appellant's Appendix below 215):

> "NOTICE OF APPEAL
>
> Notice is hereby given that City Messenger of Hollywood, Inc., a California corporation, doing business under the tradename of City Messenger Air Express, plaintiff above named, hereby appeals to the United States Court of Appeals for the Seventh Circuit from the final judgment entered in this action on March 14, 1957."

This Notice of Appeal brought up for the consideration of the Court of Appeals the entire judgment including the injunctive provision therein as well as the findings of fact and conclusions of law.

Conclusion

No confusion or conflict exists among the several Circuit Courts of Appeal concerning actions for unfair competition between American citizens, since all, including that of the Ninth Circuit, have now unanimously held that the Lanham Trade-Mark Act (15 U.S.C. Sections 1051-1127) does not apply to such actions and that the same are governed by State law.

The Court of Appeals for the Seventh Circuit gave proper regard to Rules 15(b) and 52(a) of the Federal Rules of Civil Procedure insofar as the same applied to the facts and situations in the record before it herein and in doing so did not depart from this Court's or its own previous decisions in connection with the application of such Rules.

Finally, the respondent here having appealed from the entire judgment of the District Court to the Court of Appeals that Court properly considered and passed upon all the parts thereof.

For these reasons, it is respectfully submitted, the petition for a writ of certiorari should be denied.

Harry G. Fins

and

David O. Kuh,

Counsel for Respondent.